Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MARY AMANDA WEST, a Minor Child,
by and through her Parent and
Next Friend, Rita Norris,

Petitioner,

v.

JAMES BRADLEY WAYMIRE, individually and
in his capacity as an officer of the
Frankton Police Department, the CITY OF FRANKTON,
and the FRANKTON POLICE DEPARTMENT,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a municipality is entitled to judgment as a matter of law on a civil rights claim involving a police officer who sexually molested a thirteen-year-old girl where:

a. The municipality provided no training whatsoever and had no established procedures with respect to the handling of delicate and recurring situations in which juvenile females were taken into custody by police officers;

b. The municipality had an established policy of tolerance towards sexual misconduct by police officers, including an unwritten rule that a sexual liaison in the police station itself would result only in a reprimand the first time;

c. The municipality had an established policy of protecting police officers by conducting sham or inadequate investigations of complaints of misconduct, including an instance in which the only response to a complaint that the police officer in question made sexually lewd comments regarding another thirteen-year-old girl involved an interrogation by the police officer's cousin of the girl's mother at her public place of employment; and

d. Municipal policymakers ignored repeated complaints of sexual misconduct involving the police officer who molested the plaintiff and failed to take any action despite actual knowledge of reports he was "messing around with thirteen-year-old girls."

QUESTIONS PRESENTED – Continued

2. Whether the standard for municipal liability recently announced by this Court in *Board of County Commissioners* v. *Brown*, ___ U.S. ___, 117 S. Ct. 1382, 137 L.Ed.2d 626 (1997), in the context of a single, isolated hiring decision shields a municipality in a case involving a systematic pattern of deliberate indifference evidenced by a consistent series of municipal failings in the training, supervision, investigation of complaints and remedial action with respect to police misconduct, effectively overruling this Court's decision in *City of Canton* v. *Harris*, 489 U.S. 378 (1989).

3. Whether the "plainly obvious" standard of causation for municipal liability requires conscious and detailed anticipation of the precise circumstances in which the civil rights violation will occur, barring liability absent an admission of virtual clairvoyance by municipal policymakers.

4. If the standard for municipal liability were correctly applied in this case, leaving a severely injured juvenile without an effective federal remedy for the repeated abuse of official authority by a police officer who sexually molested her in his squad car and at the police station while on duty, armed and in uniform, whether the decisions in *Brown, supra*, and *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978) should be overruled.

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I. OPINIONS AND ORDERS BELOW

The decision by the United States Court of Appeals for the Seventh Circuit that gives rise to this petition is published as *West* v. *Waymire*, 114 F.3d 646 (7th Cir. 1997), and is reprinted in the Appendix hereto at pages 1a through 16a. That decision affirmed an Amended Entry of Judgment dated September 19, 1996, an Entry of Judgment dated April 11, 1996 and an April 11, 1996 entry on summary judgment by the United States District Court for the Southern District of Indiana. The District Court entries are unpublished, and are reprinted in the Appendix at 17a through 37a.

II. JURISDICTIONAL STATEMENT

Petitioner Mary Amanda West ("Amanda") filed her complaint asserting, *inter alia*, claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, in the United States District Court for the Southern District of Indiana. The District Court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343 and 1367. On September 19, 1996, the District Court issued a final order pursuant to Fed. R. Civ. P. 54(b) against Amanda on her claims against the Town of Frankton, Indiana (the "Town"). Amanda timely appealed to the United States Court of Appeals for the Seventh Circuit, which had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294. The Seventh Circuit affirmed in an opinion dated May 21, 1997. This petition for writ of certiorari is being timely filed in accordance with Rule 13.1 of the Rules of the Supreme Court of the United

States. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. RELEVANT STATUTES

The statute involved in this case is 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IV. STATEMENT OF THE CASE

Amanda filed her complaint in the United States District Court for the Southern District of Indiana on September 1, 1994, raising federal and state law claims against James Bradley Waymire ("Officer Waymire"), the Town and the Frankton Police Department arising from a

series of instances in which Officer Waymire sexually molested her when she was twelve and thirteen years old. Amanda's complaint included civil rights claims under 42 U.S.C. § 1983 against Officer Waymire and the Town. The District Court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343 and 1367.

The Town moved for summary judgment on August 31, 1995. The District Court later granted a motion to strike an affidavit submitted on behalf of Amanda by Dr. William B. Head, an expert who analyzed the deficiencies in the Town's procedures and policies governing police interaction with juvenile females. The District Court then granted the Town's summary judgment motion on April 11, 1996, and entered final judgment in its favor pursuant to Fed. R. Civ. P. 54(b) on September 19, 1996. In that final order, the District Court declined to exercise jurisdiction over Amanda's state law claims and dismissed them without prejudice.

The District Court had earlier entered a default judgment against Officer Waymire in his individual capacity, and awarded Amanda $600,000 on her claim against him. Officer Waymire is currently serving an eight-year prison sentence. He pleaded guilty to five counts of child molesting arising from his sexual abuse of Amanda.

Amanda appealed the entry of summary judgment for the Town to the Seventh Circuit. In its opinion dated May 21, 1997, the Seventh Circuit (Posner, C.J.) affirmed based largely on its interpretation of this Court's recent decision in *Board of County Commissioners* v. *Brown*, ___ U.S. ___, 117 S. Ct. 1382, 137 L.Ed.2d 626 (1997). The Seventh Circuit held that, as a matter of law, the Town

did not exhibit deliberate indifference to a "plainly obvious" risk that Officer Waymire would molest Amanda. The Seventh Circuit did hold, however, that the affidavit of Dr. Head was improperly struck and was admissible to show departures from sound professional practice. Amanda now petitions for a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

The material facts are accurately recited in the Seventh Circuit's opinion. Officer Waymire was hired by the Town as its third full-time police officer on April 1, 1991 after a perfunctory half-hour interview. The bulk of his training consisted of a three-week course of primarily watching videotapes. The Police Department had no training requirements at the time other than firearms training. In particular, there was no established procedure for handling juveniles. *See* 3a-4a (Officer Waymire's training "did not touch on the proper treatment of juveniles encountered in the course of a police officer's work; the Frankton police department had formulated no procedures for this delicate aspect of police work").

Officer Waymire was unsupervised while on duty, was not subject to performance evaluations and was accountable for his actions only through after-the-fact review of a daily log by Chief of Police Calvin Pulley ("Chief Pulley"). Officer Waymire correctly understood that police officers were customarily given great latitude by the Town in engaging in sexual misconduct, and he looked forward to his on-duty hours as a time to pursue sexual activities. He relied on the lack of supervision and absence of disciplinary action against similarly offending officers as confirming that he would be punished for his actions, if at all, only in an inconsequential manner. He

heard that Town police officers engaged in sexual intercourse at the police station, and that a "first offense" of that type would result only in a reprimand.

Officer Waymire repeatedly abused his position and authority to coerce sexual relations. When Leslie Huffman ("Leslie"), who later married the Town's other full-time police officer David Wayne Huffman ("Officer Huffman"), reported a burglary and vandalization that she attributed to an ex-boyfriend, Officer Waymire told her he would take her in his squad car to the police station to fill out a report. He then pulled into a church parking lot, told her he was a friend of the suspect and threatened to report that she fabricated the burglary unless she performed oral sex on him. On another occasion, Officer Waymire grabbed Leslie's buttocks and tried to kiss her while she was waiting at the police station for Officer Huffman. While the Seventh Circuit's opinion questions whether these incidents were known to the Town policymakers (4a), Leslie testified she was sure that, due to the Town's small size, Officer Waymire's conduct towards her was common knowledge.

While on duty, Officer Waymire frequented Ricker's, a gas station/convenience store, and sexually harassed its employees. After he repeatedly flirted with Trudi Hines ("Trudi") and on one occasion exposed his penis to her, Trudi left Ricker's because of his conduct towards her. Officer Waymire offered to escort home another employee, Evelyn Burger ("Evelyn"), when she expressed concern about her ex-husband's release from jail. At her home, he asked her for a kiss and said he had a "hard on" for her. On another occasion at Ricker's, Officer Waymire leered at Evelyn's daughter and said she looked too good

in her jeans to be only thirteen years old. When Evelyn said she was old enough to babysit, Officer Waymire invited the girl to babysit *him* sometime.

Chief Pulley learned of the incidents involving Evelyn and assigned Officer Huffman to investigate. Officer Huffman felt uncomfortable investigating a fellow officer, expressing reluctance to conduct an investigation that could lead to Officer Waymire being fired, but Chief Pulley assured him that would not happen. Officer Huffman told Evelyn in a back room at Ricker's that the police department had been having trouble with Officer Waymire, and she expressed fear of retaliation for speaking out against him. She told Officer Huffman about the incidents, and he believed her and reported back to Chief Pulley.

Chief Pulley advised Evelyn he would interview her along with Myron Waymire ("Myron"), a member of the Town Board who was also Officer Waymire's second cousin. Officer Waymire, apparently notified, confronted Evelyn a few minutes before the interview and begged her not to say anything. Chief Pulley and Myron interrogated Evelyn at a window booth at Ricker's during heavy business hours, even though she said she was scared to antagonize a police officer. Neither man expressed concern when she told them Officer Waymire had confronted her just before they arrived. She again described the incidents, including Officer Waymire's lurid comments about her daughter, but they made no written record, did not advise any outside agency and took no action against Officer Waymire. Myron, who was very close to his cousin, felt the situation was "no big deal." Chief Pulley dropped the investigation, ostensibly because Evelyn did

not file a written complaint, although Evelyn was not invited to do so and was not told a written complaint was necessary.

Officer Waymire requested an executive session of the Town Board regarding allegations that he claimed were damaging his reputation and that of his family. Evelyn's allegations were discussed in a session closed to the public and attended only by Chief Pulley, Officer Waymire, Officer Huffman and the three Town Board members, including Myron. Officer Waymire admitted to rumors he was "messing around with thirteen-year-old girls." The Town Board, nevertheless, did not pursue any further investigation and took no action against him, concluding that the problem was between Officer Waymire and Officer Huffman and the two should work it out between themselves.

The Town Board had a history of inaction in response to complaints of police misconduct. When about three hundred Town residents signed a petition demanding that Officer Huffman be fired, the Board's response was to show the petition to Officer Huffman so he would know who signed it. On another occasion, the Board refused to take action when a medical technician complained that Officer Huffman improperly detained her when she was on her way to the hospital for a medical emergency.

Amanda, a troubled young girl, was twelve years old the first time Officer Waymire molested her. He had about twenty encounters with her in his official capacity, often outside and at night. Although he typically recorded the encounters in his daily log, Chief Pulley

never questioned him about his frequent contact with Amanda. On one occasion, Officer Waymire caught Amanda outside after curfew and offered her a ride home. He instead took her to the Frankton Saw Mill, where he exposed and fondled her breasts and buttocks. On another occasion, he found Amanda and one of her friends outside at 3:30 a.m., engaged in sexually explicit conversation with them and exposed and fondled their breasts. In September 1993, Officer Waymire went to Amanda's home and told her mother he would have to take Amanda to the police station to administer a breathalyzer test. At the police station, he instructed Amanda to lie down on a couch naked, inserted his finger into her vagina, directed her to perform fellatio on him, rubbed his penis between her breasts and directed her to stimulate him manually until he ejaculated.

When Chief Pulley learned of Officer Waymire's sexual misconduct with Amanda, he did not insist on a written complaint or restrict the inquiry to an internal investigation or an interrogation by Officer Waymire's cousin. Instead, he referred the matter to the Madison County Sheriff's Department. The resulting investigation led to Officer Waymire's conviction on five counts of child molesting.

V. REASONS FOR GRANTING THE PETITION

This case graphically illustrates the lengths to which the federal judiciary is now willing to go to insulate municipalities from civil rights liability, demonstrating the urgent need for this Court to clarify or revise the

applicable standards. The Seventh Circuit expressed doubt as to the governing standard, preferring proof of criminal recklessness while suggesting this Court "may" have held that civil recklessness is sufficient to impose liability. The Seventh Circuit nevertheless concluded, as a matter of law, that here the Town cannot be held liable because it did not disregard any "plainly obvious" danger to Amanda. The standard of deliberate indifference would, by the teaching of this case, require a conscious expectation by municipal policymakers of the precise circumstances in which the violation would occur. The Seventh Circuit's expansive application of this Court's recent decision in *Brown*, which concerned a single isolated hiring decision, would effectively overrule the standard established in *City of Canton* v. *Harris*, 489 U.S. 378 (1989), which held municipal liability *could* be based on a failure to train and supervise employees.

The result in this case leaves a severely mistreated juvenile girl without an effective federal remedy for her extensive damages from an egregious abuse of official power by a uniformed police officer. Her claim against Officer Waymire individually reaches only the personal assets of an incarcerated prisoner. Her claim against the Town is supported by a consistent pattern of misconduct, including an utter failure to train and establish procedures for recurrent and extremely delicate situations in which juvenile females are taken into custody, a policy of acquiescence regarding sexual misconduct by police officers, a custom of inaction on complaints against police officers, and a refusal to take action despite actual notice that Officer Waymire was "messing around with thirteen-year-old girls." If summary judgment was properly

granted to the Town in this case, then municipal liability for civil rights violations is a legal fiction without practical application in real-life situations. Unless this Court is content to erect standards for municipal liability so extreme they can never be satisfied, it should grant certiorari, explain the appropriate standard and reverse the judgment.

A. The Seventh Circuit Misapplied the Governing Standard for Municipal Liability, Demonstrating a Pressing Need for Clarification by this Court

In *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 689-94 (1978), this Court held that municipalities are "persons" that could be held liable under 42 U.S.C. § 1983 for civil rights violations, so long as liability is based on a municipal "policy" or "custom" and is not merely vicarious liability under the doctrine of respondeat superior. In *Canton*, 489 U.S. at 387-92, this Court applied the *Monell* standard in the context of a claim based on a failure to provide adequate training, and concluded that the municipality could be held liable where its omissions amount to deliberate indifference to the rights of affected citizens. In this case, nevertheless, the Seventh Circuit held as a matter of law that the Town cannot be liable on Amanda's civil rights claim, despite the abundant evidence of a municipal policy of acquiescence towards sexual misconduct by police officers, an absence of training, supervision and adequate procedures, and a studied indifference to the dangers Officer Waymire presented. While the injustice of the decision in this case warrants correction, the rule of law it represents

and its precedential significance demand review by this Court.

As Justice Breyer recently pointed out, the *Monell* standard "has generated a body of interpretive law that is so complex that the law has become difficult to apply." *Brown*, 117 S. Ct. at 1401 (Breyer, J., dissenting). In affirming the grant of summary judgment for the Town here, the Seventh Circuit expressed confusion as to the appropriate standard. Chief Judge Posner stated that, under Seventh Circuit precedent, liability under Section 1983 must be established under a criminal recklessness standard, *i.e.*, conscious disregard of a known danger. *See* 12a. He indicated, however, that this Court's decisions in *Canton* and *Brown* "may" suggest a standard of civil recklessness will suffice, *i.e.*, indifference to a known *or obvious* danger. 12a-13a, 14a. The compelling circumstances of this case present an ideal vehicle for this Court to rectify the evident confusion of lower courts attempting to apply *Monell*.

As the Seventh Circuit indicated, Officer Waymire was acting under color of state law when he detained Amanda and molested her while she was in custody. *See* 2a. His sexual acts, moreover, constituted an infringement of liberty in violation of her due process rights. *Id.* There is no question that Officer Waymire was correctly held liable on Amanda's civil rights claim. The only issue is whether the Town is absolved of liability as a matter of law. In light of the Seventh Circuit's evident preference for retaining a standard of criminal recklessness in this

context,[1] this Court should remove the persisting cloud of doubt and clarify that indifference to an "obvious" danger is sufficient to support municipal liability for civil rights violations. *See Brown*, 117 S. Ct. at 1390 ("known or obvious," "know or should know"); *id.* at 1392 ("plainly obvious"); *Canton*, 489 U.S. at 390 ("obvious").

Applying the correct legal standard, there are clearly triable issues of fact on Amanda's civil rights claim against the Town. Under Indiana law and by common sense, the presence of recklessness is a question of fact for the jury. *See HCC Credit Corp.* v. *Springs Valley Bank & Trust*, 669 N.E.2d 1001, 1005 (Ind. App. 1996) (Kirsch, J., dissenting); *Campbell* v. *Railroadmen's Federal Savings and Loan Assn.*, 443 N.E.2d 81, 83 (Ind. App. 1982) (civil recklessness). *See also Morse* v. *Indiana*, 646 N.E.2d 332, 334 (Ind. App. 1995) (criminal recklessness). In affirming summary judgment for the Town, the Seventh Circuit engaged in impermissible fact-finding against Amanda, to the effect that Officer Waymire's sexual comments about Evelyn's thirteen-year-old daughter were, in context, merely banter with the mother and insufficient to put the Town on notice of the danger to Amanda. *See* 14a-15a. Chief Judge Posner offered the view that vulgar

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[1] *See* 12a (citing an en banc Seventh Circuit decision as establishing that "criminal recklessness [is] a sine qua non of liability in *any* section 1983 case") (emphasis in original); *id.* (noting that other Seventh Circuit cases suggested civil recklessness may be sufficient "despite the en banc decision"); *id.* (noting this Court's decisions in *Canton* and *Brown* "invite reconsideration" of the en banc decision); 14a (holding civil recklessness "may *be* the standard after *Brown* and *Canton*") (emphasis in original).

men frequently leer at and proposition pubescent girls, so that the risk of molestation could not be considered "obvious." *Id.*

While the reason for the Seventh Circuit's haste to exculpate the Town with one view of the evidence is unclear, a reasonable jury plainly *could* adopt a different interpretation and conclude that the Town was deliberately indifferent to an obvious danger posed by Officer Waymire. Evelyn, clearly, considered the threat sufficiently great to warrant an official investigation. Officer Waymire, moreover, found the allegations that he was "messing around with thirteen-year-old girls" serious enough to convene an executive meeting of the Town Board. Despite the conscious recognition that Officer Waymire's conduct was egregious, the Town's reaction was calculated to protect Officer Waymire rather than Town residents. Even before any investigation, Chief Pulley assured Officer Huffman that Officer Waymire would not be fired. The Town deviated from standard procedure by failing to refer the investigation to an outside agency. Instead, Evelyn was questioned by other members of the Town police force and by Officer Waymire's cousin. Despite her repeated fear of retaliation, Officer Waymire was notified of the impending interrogation and given an opportunity to confront Evelyn minutes before the interview. She was not invited to explain her fears at the subsequent executive session of the Town Board, which took no action whatsoever to discipline Officer Waymire.

While the record warrants trial on Amanda's claim against the Town on the evidence relating to Officer

Waymire's conduct towards Evelyn's thirteen-year-old daughter alone, the Town's failures in training and supervision and its policies and customs regarding police misconduct provide independent grounds for liability. *See Brown*, 117 S. Ct. at 1390-91 (municipality may be liable where the need for training is apparent "to handle recurring situations" *or* when specific instances put municipal decisionmakers "on notice that a new program is called for"); *Canton*, 489 U.S. at 396-97 (O'Connor, J., concurring in part and dissenting in part) (distinguishing between two ways the need for training may be obvious: duties implicated by recurrent situations and failure to react adequately when a pattern of violations puts municipal policymakers on notice); *Monell*, 436 U.S. at 690-94 (liability may be based on a "policy" reflected in the decisions of municipal policymakers or a "custom" that has not been formally approved).

In this case, the Seventh Circuit failed to credit the Town's culpability in its failure to provide any training or establish any procedures to handle the recurring exigencies of juveniles taken into police custody, its policy of tolerance towards sexual misconduct by police officers, and its customary indifference to complaints of police misconduct. Amanda plainly produced sufficient evidence to justify a trial on her claim against the Town under the governing standards of municipal liability. The Seventh Circuit's opinion to the contrary establishes a dangerous precedent and marks a deviation from this Court's decisions that calls for correction by this Court.

B. The Seventh Circuit's Expansive Interpretation of this Court's Decision in *Brown* Ignores the Narrow Context of its Holding and Effectively Overrules the Canton Decision

In holding the Town is entitled to judgment as a matter of law, the Seventh Circuit was apparently swayed by this Court's recent decision in *Brown* as an indication that the wind is blowing against municipal liability. Chief Judge Posner cited *Brown* a half dozen times in concluding that the Town did not disregard any "plainly obvious" danger posed by Officer Waymire. While a sharply divided Court overturned a plaintiff's verdict against a county in *Brown*, it did so in circumstances far afield of the record presented here. The Seventh Circuit's decision, if allowed to stand, would effectively overrule the principle established in *Canton*, that a municipality may be liable for a failure to train. The shift in Section 1983 jurisprudence marked by *Brown* obviously requires a corresponding hedge against the opposite extreme and a reaffirmation of the *Canton* standard.

Two themes were repeatedly emphasized by this Court as warranting the result in *Brown*. First, this Court stressed that the challenged conduct in that case was a hiring decision rather than a failure to train and supervise. *See* 117 S. Ct. at 1387 (declining to address the inadequate training claim); *id.* at 1391 ("The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive."). The Court explained that cases involving "an ill-considered hiring decision" posed an unusual risk that a municipality may be found liable without fault, inasmuch as almost any act by a municipal employee could be traced back to the decision

to hire in the first place. *Id.* at 1393-94. The *Monell* principle that municipalities cannot be held vicariously liable, therefore, warrants special treatment of hiring and inadequate screening claims.

Second, the Court's decision in *Brown* underscored the fact that the claim there was based on a single, isolated hiring decision rather than any pattern of misconduct. *See* 117 S. Ct. at 1387 ("single decision to hire"); *id.* at 1388 ("single hiring decision," "single act"); *id.* at 1389 ("single facially lawful hiring decision," "single decision"); *id.* at 1391 ("single hiring decision," "single instance of inadequate screening"); *id.* at 1392 ("an instance of inadequate screening"); *id.* at 1394 ("isolated decision to hire"). Again, the Court explained, "Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high." *Id.* at 1390.

Here, by contrast, neither of the qualifications that drove the decision in *Brown* pertain. While the decision to hire Officer Waymire was certainly lax, Amanda's claim is based on what the Town did and failed to do *after* he was hired. Despite the obvious and recurring hazards associated with taking juvenile females into police custody, the Town provided no training whatsoever and had no established procedures for what even the Seventh Circuit described as a "delicate aspect of police work." *See* 3a-4a. *See also* 8a (describing the danger inherent in "a male police officer whose employer has invested him with intimidating authority to deal in private with troubled teenaged girls"). The serious omission in the first instance was coupled here, moreover, with an unusual

latitude in performing police functions without supervision or accountability, with a policy of sexual tolerance (including an unwritten rule that using the police station for sexual liaisons would result only in a reprimand the first time the officer was caught), with an established pattern of turning a deaf ear to complaints of police misconduct, and with a failure to take any corrective action when reports surfaced that Officer Waymire was "messing around with thirteen-year-old girls." This case involves, in short, both a failure to train and supervise rather than an improper hiring decision and a pattern of municipal wrongdoing rather than an isolated instance.

The Seventh Circuit, nevertheless, applied the standard articulated in *Brown* without any suggestion that its holding reflected the unique considerations raised by a claim based on a single, isolated hiring decision. By treating *Brown* as the governing standard in a case challenging grossly deficient training and supervision and raising a series of municipal failings, the Seventh Circuit in essence concluded that the holding in *Canton* was no longer good law. In *Canton*, this Court held that a municipality *may* be held liable for inadequate police training "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388 (footnote omitted). Here, there is an abundance of evidence on which a jury could reasonably conclude that the Town was deliberately indifferent to the rights of those encountered by Officer Waymire in the course of his official duties. The need for a clarifying decision by this Court reaffirming *Canton* and restricting the scope of *Brown* to the context of the special concerns it

addressed is apparent, and this case squarely presents that important issue.

C. The "Plainly Obvious" Standard Announced in *Brown* Must Be Balanced with a Reasonable Test of Foreseeability that Will Not Eviscerate the *Monell* Standard of Municipal Liability

In *Monell*, 436 U.S. at 689-94, this Court held that municipalities were "persons" subject to liability for civil rights violations, while cautioning that vicarious liability under the doctrine of respondeat superior would not be sufficient under Section 1983. The recent decision in *Brown* reflects a concern that the qualification in *Monell* would be eroded by a standard that could impose liability without evidence of fault on the part of a municipality. *See* 117 S. Ct. at 1388, 1390, 1393-94. This case, by contrast, presents the risk that the central holding in *Monell* will be undermined in the other direction: that municipalities will *not* be subject to liability under Section 1983 regardless of the degree of municipal fault.

In *Brown*, this Court restricted the scope of municipal liability by establishing a "plainly obvious" standard of causation, calling for evidence "that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff." 117 S. Ct. at 1392 (emphasis in original). *Compare Canton*, 489 U.S. at 391 ("for liability to attach in this circumstance the identified deficiency must be closely related to the ultimate injury"; "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?"). In this case, the Seventh Circuit fastened on

the "plainly obvious" language in *Brown* and concluded that the Town did not fail to heed any plainly obvious signals that Officer Waymire would molest a thirteen-year-old girl. *See* 15a. Chief Judge Posner opined that "the fact that a man is an adulterer does not give rise to an inference that he's also a child molester" (10a) and that Officer Waymire's sexual comments about Evelyn's daughter "is not the equivalent of a threat to commit criminal acts upon that or any other 13 year old" (15a).

Under the Seventh Circuit's reading of *Brown*, a municipality could not be held liable unless its policy-makers admitted to conscious awareness that the precise circumstances of the violation were anticipated in specific detail. It is not enough that the Town failed to provide any training and failed to establish any procedures to protect the rights of juvenile females taken into custody by police officers. It is not enough that the Town condoned an atmosphere of sexual freedom for police officers and habitually protected them against charges of misconduct. It is not enough that the Town refused to conduct a reasonable investigation of reports that Officer Waymire was "messing around with thirteen-year-old girls" and failed to question his frequent and unsupervised contact with Amanda. What the Seventh Circuit would require was actual notice that Officer Waymire threatened to commit criminal acts of child molestation. The chances that a municipality would *ever* be found liable under that standard are extremely remote.

The point this Court was making in *Brown* was that there must be a causal connection between the municipality's conduct and the injury at issue. Consistent with

the civil recklessness standard, the tort principle of reasonable foreseeability is the appropriate test to apply in these circumstances. As this Court explained in *Canton*, the municipality's deliberate indifference must be sufficiently related to the violation to constitute a proximate cause of the injuries. 489 U.S. at 390-91. Here, the jury could reasonably find that an abuse of Officer Waymire's authority as a police officer to coerce sexual relations with a female taken into custody was a foreseeable consequence of the Town's deficient training, supervision and procedures and its policy of tolerance regarding sexual misconduct by police officers.

Notwithstanding the Seventh Circuit's view that an adulterer is not necessarily a child molester (10a), the sexual offender here was an armed and uniformed police officer given unsupervised authority to detain, search and arrest females, including underaged girls, without any training or any procedures to prevent abuse of that authority, and to do so with the understanding that sexual transgressions would not carry any serious consequences. In the inherently coercive context of custodial detention by a police officer, even ostensibly consensual sexual intercourse is far more an abuse of official power than mere adultery. As the Seventh Circuit admitted, "a male police officer whose employer has invested him with intimidating authority to deal in private with troubled teenaged girls" poses a risk that he may "tak[e] advantage of the opportunity that authority and proximity and privacy give him to extract sexual favors from these girls." 18a. If Amanda were an adult, Officer Waymire's misuse of his position to leverage sexual relations

would clearly be a proximate result of the Town's defective policies and procedures. That she is a child should not exculpate the Town, particularly where the Town was put on specific notice that Officer Waymire *was* engaging in sexual misconduct, was having frequent unsupervised contact with Amanda and was rumored to be "messing around with thirteen-year-old girls."

The "plainly obvious" language in *Brown* must be read in the context of the holding in *Monell* that municipal liability arises from the conduct and shortcomings of the municipality itself and not simply by respondeat superior. At a certain level of abstraction, every civil rights violation can be attributed to a municipal policy or custom, such as the decision to establish a police force in the first place, and therefore a standard of proximate causation is required to uphold the caution in *Monell* that municipal liability cannot be purely vicarious. The opposite extreme, however, presents an equal threat to the rationale of *Monell*. At a certain degree of specificity, *no* civil rights violation will be attributable to a municipality that is liable only for acts that it consciously anticipates in every nuance. *Brown* preserves the prohibition in *Monell* against vicarious municipal liability. A decision by this Court in this case is necessary to prevent the ultimate holding in *Monell* – that municipalities *are* subject to liability under Section 1983 – from becoming an abstract principle without practical application in any but the most extraordinary of circumstances.

D. The Unjust Result in this Case Invites Reconsideration of the Legal Principles Relied on by the Seventh Circuit

If the Seventh Circuit misapplied the principles of municipal liability established by the governing decisions of this Court, most recently in *Brown*, then review by this Court is required to clarify the law and prevent the Seventh Circuit's decision from becoming the new standard on this important subject in the lower courts. If, on the other hand, the Seventh Circuit's decision is the result of a correct interpretation of the controlling standards, then this case demonstrates a pressing need to revise those principles in order to preserve the remedial function of Section 1983 in cases of police misconduct.

In his dissenting opinion in *Brown*, Justice Breyer, joined by Justice Stevens and Justice Ginsburg, suggested that rather than attempting to "spin ever finer distinctions" to preserve the *Monell* line between vicarious liability and liability based on municipal fault the court "should reexamine the legal soundness of that basic distinction itself." 117 S. Ct. at 1401. He pointed out that the original rationale for the holding in *Monell* that vicarious liability was impermissible under Section 1983 was faulty both in terms of historical analysis and by interpretation of the statutory language. *Id.* at 1401-02. He further questioned the wisdom of sustaining the complex body of interpretive law entailed by the *Monell* distinction with increasingly subtle yet perilous nuances of doctrinal law (*id.* at 1402-03), and expressed skepticism as to the extent of municipal reliance on *Monell* (*id.* at 1403-04). The result reached by the majority in *Brown* also led Justice Souter, in a separate dissent, to question whether "there was

sufficient reason to unsettle the precedent of *Monell*." *Id.* at 1400.

The circumstances in this case present a much more compelling foundation for reconsideration of *Monell* than those in *Brown*. A little girl has been repeatedly sexually brutalized by a uniformed police officer, yet is left by the Seventh Circuit's decision without an effective remedy for the outrageous violations of her civil rights. Her claim against Officer Waymire as an individual reaches only the personal assets of a man now serving a lengthy prison sentence for his crimes. Only her claim against the Town offers any realistic opportunity for adequate compensation for the severe injuries she has suffered. That claim, however, has been rejected as a matter of law by an application of the standards that this Court articulated in *Brown* in an effort to preserve the *Monell* prohibition against vicarious municipal liability. For Amanda, the remedial purpose of Section 1983 has become lost in the shifting complexities of the doctrinal maze of municipal liability.

There can be no doubt that Amanda's injuries flowed from the official authority with which the Town vested Officer Waymire. The first time he molested her was in his squad car after he caught her outside at night past curfew. On another occasion, he gratified his sexual desires with Amanda and one of her friends when he encountered them outside at 3:30 a.m. The most serious incident occurred in the police station after he removed her from her home, telling her mother he needed to take her away to administer a breathalyzer test. In every instance, he was on duty, armed and in uniform. It is difficult to perceive any injustice that would result from

holding the Town responsible for the abuse of official power by an officer to whom it entrusted intimidating law enforcement authority, an officer clothed with the coercive power to compel Town residents to obey his dictates under the implicit threat of incarceration and even the potential use of deadly force. To the extent that municipalities like the Town have relied on *Monell* to avoid responsibility for the actions of those cloaked with the official power of the government to invade the liberty of citizens, such an abdication of the public trust is more a reason to change the law than to perpetuate their insulation from accountability.

The shocking nature of the offenses at issue in this case is of a type ordinarily associated with wartime atrocities. Yet here, the predator was not a soldier engaged in military conflict in enemy territory, but the very individual charged with protecting the residents of the Town from criminal aggression. As Evelyn and Amanda discovered, the avenues of recourse are dangerously restricted when the source of misconduct is the very agency responsible for enforcing the law and preserving the peace, and when the municipality that established and maintains that agency refuses to be held accountable for abuse of the power so invested. A citizenry terrorized by the uniformed incarnation of official authority is the essence of oppression and cannot be tolerated in a civilization founded on principles of ordered liberty.

If the end product of the skein of interpretive law safeguarding the *Monell* principle is that a little girl psychologically scarred for life by the predation of an individual clothed and armed with the authority of the government is denied a remedy against the Town that

empowered her molester and refused to restrain his abuse, then the function of Section 1983 to provide relief to those oppressed by local authorities has been seriously undermined. If the complex standards of municipal liability under *Monell* or the justice of this case must yield, Amanda respectfully submits that it is the penumbra of *Monell* and not her claim against the Town that conflicts with the meaning and purpose of Section 1983.

VI. CONCLUSION

The principles of municipal liability under *Monell* have had a troubled history in the decisions of this Court. Earlier this year, this Court established in *Brown* a set of legal boundaries designed to prevent municipalities from being held liable without fault, preserving the *Monell* standard barring vicarious liability. This case requires a corresponding definition of the boundaries in the other direction, in order to preserve the holding in *Monell* that municipalities *are* subject to liability under Section 1983 in appropriate circumstances. The stakes in the case begin with an adolescent girl who was sexually abused on several occasions by a police officer who was on duty, armed and in uniform. The principles at issue and the precedential significance of the case, however, go far beyond the rights of Amanda and her prospects for a compensatory remedy, and implicate the fundamental effectiveness of a statute enacted to provide relief from abuse of official power. Amanda respectfully requests

that this Court grant the petition and decide the important questions of law presented by this case.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3675

MARY AMANDA WEST, a minor child, By and through her parent and next friend, RITA NORRIS,

Plaintiff-Appellant,

v.

JAMES BRADLEY WAYMIRE, CITY OF FRANKTON, and FRANKTON POLICE DEPARTMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 94 C 1299 – Larry J. McKinney, *Judge.*

ARGUED APRIL 3, 1997 – DECIDED MAY 21, 1997

Before POSNER, *Chief Judge,* and HARLINGTON WOOD, JR. and RIPPLE, *Circuit Judges.*

POSNER, *Chief Judge.* This is a suit for damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983, brought on behalf of a minor, Amanda West, against Brad Waymire, a former police officer of the Town of Frankton, Indiana, and against the Town itself. (The Town is erroneously

called "City of Frankton" by the lawyers for both sides.) The naming of the Town's Police Department as a defendant adds nothing; it is almost certainly not a suable entity separate from the Town. See *Dean v. Barber*, 951 F.2d 1210, 1214-15 (11th Cir. 1992); *Ricketts v. City of Hartford*, 74 F.3d 1397, 1400 n. 1 (2d Cir. 1996); *Martinez v. Winner*, 771 F.2d 424, 444, modified on other grounds, 778 F.2d 553 (10th Cir. 1985), vacated on other grounds under the name *Tyus v. Martinez*, 475 U.S. 1138 (1986).

The suit alleges an infringement of rights protected by the due process clause of the Fourteenth Amendment, arising from the following facts. Between sometime in 1992 and September 1993, defendant Waymire (who was 28 years old at the beginning of the period, and married) engaged in sexual acts with plaintiff West, although she was only 13 at the beginning of the period. He was eventually convicted of child molesting on the basis of these acts and sentenced to prison for eight years. We may assume that Waymire was acting under color of state law and that the sexual acts that he perpetrated on West with or without her consent and that she claims caused her extreme and lasting humiliation and psychological injury deprived her of liberty within the meaning of the due process clause of the Fourteenth Amendment, *Doe v. Taylor Independent School District*, 15 F.3d 443, 450-52 (5th Cir. 1994) (en banc); *Scott v. Moore*, 85 F.3d 230, 234-35 (5th Cir. 1996); *Abeyta v. Chama Valley Independent School District*, 77 F.3d 1253, 1255 (10th Cir. 1996); *Stoneking v. Bradford Area School District*, 882 F.2d 720, 727 (3d Cir. 1989), and hence that she has a good claim under section 1983 against him. Waymire did not bother to appear in the suit, and the plaintiff obtained a default judgment

against him, leaving the Town as the only defendant – and the district judge granted summary judgment for the Town on the ground that it was not liable for Waymire's acts. West's complaint included a supplemental state-law claim against the defendants, but the district judge relinquished jurisdiction over it, and West has since refiled it in an Indiana state court.

The case was not over in the district court. Damages remained to be assessed against Waymire on the default judgment. But the district court entered a final judgment under Fed. R. Civ. P. 54(b) in favor of the Town, and it is from that judgment that West appeals. Since West's federal claim against Waymire remained pending in the district court, the judge's action in relinquishing jurisdiction over the supplemental state-law claim was premature. But as the plaintiff is not complaining about the dismissal, we shall treat it as voluntary on her part and let it stand. The judge later entered judgment against Waymire for $600,000; we do not know how much if any of this judgment the plaintiff has been able to collect.

The facts, at least when viewed as favorably to the plaintiff as the record will permit, as we are obliged to do when summary judgment is granted for the defendant, reveal a pattern of official irresponsibility. Waymire was hired in 1991 to be only the third full-time police officer in the town (Frankton has a population of only 2,000), one of the other full-time officers being the chief of police, Calvin Pulley. Waymire was hired after a brief and superficial interview. He had no background as a police officer (though he had studied criminal justice in college); yet he was given only four weeks of police training, and it did not touch on the proper treatment of juveniles

encountered in the course of a police officer's work; the Frankton police department had formulated no procedures for this delicate aspect of police work. Nor, after he was hired, did the department, which is to say the chief, supervise Waymire or the other line officer, David Huffman – with whom Waymire had from the start poor relations. Huffman seems not to have been a star police officer. A petition that he be fired garnered the signatures of 300 Frankton residents. The town board's response was to show the petition to Huffman so he'd know whose names were on it. He was, however, reprimanded for using baby talk in his log sheet ("I helped a little bitty baby rabbit because a big, bad, mean car ran over it").

Waymire correctly believed that being a Frankton police officer would provide him with opportunities for extramarital sex. He had heard that police officers had been known to engage in sexual intercourse in the Frankton police station and that a "first offense" of this kind, if detected, would result only in a reprimand. In March of 1992, responding to an emergency call from Huffman's girlfriend (now wife), whose home had been burglarized by a friend of Waymire's, Waymire told Mrs. Huffman (as she now is) that unless she performed fellatio on him he would report that she had fabricated the burglary. She didn't tell Huffman about this incident, but did tell him about a subsequent incident in which Waymire grabbed her buttocks and tried to kiss her. Although the Huffmans did not complain and there is no direct evidence that either incident involving Mrs. Huffman was known to Chief Pulley or the Town's board of supervisors, the plaintiff points out that not only is Frankton a very small town but Waymire is related to a number of its residents;

indeed he testified in his deposition, we hope with some exaggeration (for otherwise Frankton has a severe problem of inbreeding), that he is related to a "majority" of the people of Frankton. In explanation of why she hadn't complained about Waymire, Mrs. Huffman testified in her deposition that Frankton is so small that "once one person knows, it seems like everybody knows, and that's not me. I like to keep to myself."

Another series of acts by Waymire before his molesting of Amanda West did give rise to a complaint. Evelyn Burger (Evelyn Harmon during the relevant period) was afraid of her ex-husband, who had just been released from prison. So she asked Waymire to escort her home, which he did – but as he left, he said, "Come here. . . . I'd like to kiss you. . . . Come on baby, I've got a hard on." She refused to let him kiss her. On another occasion Waymire was in the store where Burger worked. Her daughter, a 13 year old, was there too. Waymire remarked that "no 13 year old looks that good in a pair of jeans," and he asked the girl whether she'd "like to baby-sit my kids or me." Officer Huffman learned about these incidents and told Chief Pulley, who told Huffman to speak with Burger. He did so. Later, Pulley, Huffman, and another Waymire – Brad's cousin Myron, who happened to be the president of the town board and who had originally recommended that the police department hire Brad – interviewed Burger at her place of work. (Only minutes before, Brad Waymire had begged her not to complain about him.) The cousin thought her allegations no big deal. The chief decided to drop the investigation because Burger had not filed a written complaint – though she hadn't been told that a written complaint was

necessary and had told the chief and his companions that she was scared to sign anything. She "didn't want to be bothered by cops," and believed that Brad's cousin, being on the town board, would protect him.

In March of 1993, about midway in Waymire's course of molesting Amanda, he had the effrontery to request an executive meeting of the town board to enable him to clear himself of allegations that he claimed were ruining his reputation. The reference was to the Burger incidents; and at the hearing he pointed out, apparently alluding to his remarks to her daughter, that it was rumored that he was "messing around with 13 year old girls." Huffman attended the meeting also. The Burger incidents were ventilated, but there was no reference to any misconduct with minors and the board members formed the impression that the root problem was bad blood between Waymire and Huffman and that the solution was for the two of them to work out their differences between themselves.

Here is how the molestation of Amanda West occurred. Frankton had a curfew, which Amanda, a disturbed child from a disordered home, regularly violated. Often when this happened Waymire would give her a ride home. Their conversations during these late-night rides soon took a sexual turn, and Waymire would sometimes fondle her breasts and buttocks. Once he took her to the police station on the pretext of giving her a breathalyzer test, and at the station forced her to undress and to perform fellatio on him. Eventually her mother discovered what was going on and reported it to Chief Pulley, who, this time not insisting on a written complaint,

referred the matter to the county sheriff. The sheriff conducted an investigation that led to the successful prosecution of Waymire.

The record contains evidence of other sexual misconduct by Waymire, including exposing himself to a coworker of Burger's, although there is no evidence that the police chief or the town board knew about any of this other misconduct. Apart from the remarks about Burger's daughter and, of course, his conduct with Amanda, none of Waymire's sexual conduct or innuendoes involved, so far as anyone knows, minors.

Were this an ordinary tort case (as its state-court clone appears to be, cf. *Tittle v. Mahan*, 582 N.E.2d 796 (Ind. 1991); *Tom v. Voida*, 654 N.E.2d 776, 786 (Ind. App. 1995); *City of Indianapolis v. Ervin*, 405 N.E.2d 55, 60 (Ind. App. 1980)) there would be little doubt about the liability of the Town of Frankton, as Waymire's employer, for the tortious acts that Waymire committed upon Amanda, assuming the plaintiff's version of the facts was confirmed at trial. It is true that the sexual misconduct of an employee, being intentional misconduct unrelated to any possible motive of furthering the employer's business, is not automatically imputed to the employer under the doctrine of respondeat superior even when it occurs at work during working hours. *Konkle v. Henson*, 672 N.E.2d 450, 456-57 (Ind. App. 1996); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317-18 (2d Cir. 1995); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261-62 (4th Cir. 1996); W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 70, pp. 505-06 (5th ed. 1984). And in the analogous area of sexual harassment by one nonsupervisor worker of another, challenged dunder Title VII of the Civil Rights

Act of 1964, the plaintiff must, at least if the harasser is not a supervisory employee, show that the employer was negligent in failing to prevent the harassment. E.g., *McKenzie v. Illinois Dept. of Transportation*, 92 F.3d 473, 480 (7th Cir. 1996); *Baskerville v. Culligan International Co.*, 50 F.3d 428, 432 (7th Cir. 1995); *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir. 1996); *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 966 (8th Cir. 1993). But when the employee is a male police officer whose employer has invested him with intimidating authority to deal in private with troubled teenaged girls, his taking advantage of the opportunity that authority and proximity and privacy give him to extract sexual favors from these girls should be sufficiently within the orbit of his employer-conferred powers to bring the doctrine of respondeat superior into play, *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1349-53 (Cal. 1991); *Primeaux v. United States*, 102 F.3d 1458, 1463 (8th Cir. 1996); *Red Elk v. United States*, 62 F.3d 1102, 1107 (8th Cir. 1995), even though he is not acting to further the employer's goals but instead is on a frolic of his own. We want the police department to supervise its officers in this domain with especial care, and so we do not impose on the plaintiff the burden of establishing negligent supervision. The application of the doctrine of respondeat superior in these circumstances is nourished by the same considerations of policy that impose strict liability, or a nondelegable duty of care, on enterprises engaged in especially hazardous activities. The more hazardous the activity, the more we want the actor to investigate *all* feasible means of reducing the hazards, whether or not they are means encompassed by a judge's or jury's conception of due care. *Indiana Harbor Belt R.R. v. American*

Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990); *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 939 (7th Cir. 1986).

But the doctrine of respondeat superior is not available to a plaintiff in a section 1983 suit. E.g., *Board of County Commissioners v. Brown*, 117 S. Ct. 1382, 1388 (1997). This would be of no importance in this case if such suits were otherwise governed by ordinary tort principles. For, as in the Title VII cases that we cited, an employer who fails to use due care to prevent its employees from committing tortious acts is liable for its negligence without regard to respondeat superior. *American Dental Ass'n v. Martin*, 984 F.2d 823, 828-29 (7th Cir. 1993); *Pomer v. Schoolman*, 875 F.2d 1262, 1266 (7th Cir. 1989); Keeton *et al.*, *supra*, § 70, pp. 501-02. The facts that we have recited indicate that the Town of Frankton *was* negligent in its supervision of Waymire. The Town's tiny size is not an excuse, for it is nowhere graven that every village shall have its own police force even if the village is too small or too poor to conduct even a minimally professional police operation. In fact Frankton relies heavily on the county sheriff's department, as in the investigation of the complaint of child molestation lodged against Waymire. Even so, there is a question whether his molesting her was sufficiently foreseeable to make the Town liable. *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991); *Bailor v. Salvation Army*, 51 F.3d 678, 683 (7th Cir. 1995) (applying Indiana law); *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 489 (7th Cir. 1995) (same); *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (Cardozo, C.J.); 3 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* § 18.2 (2d ed. 1986). It seems doubtful that the fact that police officers sometimes encounter teenage girls

in the line of duty obligates a police department to take measures to prevent its officers from molesting these girls, on the theory that such molestation is so likely that it should be deemed foreseeable, that is, should actuate preventive measures. Chief Pulley should have taken Burger's complaint more seriously and should have dispelled any impression that the police department or the town board condoned the use of the police station for trysts. But the fact that a man is an adulterer does not give rise to an inference that he's also a child molester.

It is possible, though highly speculative, that had the Town taken effective measures against the risk that Waymire posed to adult women – the risk, known to the Town as a result of Burger's complaint, of low-level sexual harassment – an incidental consequence would have been to prevent or deter Waymire from molesting the plaintiff. Although that would make the Town's inaction a "but for" cause of the molestation, "but for" causation is not enough for legal liability. We know this from such tort classics as *Gorris v. Scott*, 9 L.R.-Ex. 125 (1874). The defendant's ship was supposed to be, but was not, equipped with pens to separate the animals carried on it, so that they wouldn't infect each other. The plaintiff's animals were washed overboard in a storm. Had the defendant complied with its statutory duty to install the pens, the animals would not have been lost. Nevertheless the defendant was not liable. The loss that occurred was not the loss that could have been foreseen as a consequence of the failure to take a disease-control measure. See also *Edwards v. Honeywell, Inc.*, *supra*, 50 F.3d at 489-90; *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1301 (7th Cir. 1995); *Israel Travel Advisory Service, Inc. v. Israel Identity Tours,*

Inc., 61 F.3d 1250, 1258 (7th Cir. 1995); *Palsgraf v. Long Island R.R., supra.*

Even if what Waymire did to Amanda would be deemed by an Indiana court to be a foreseeable, actionable consequence of the Town's negligent supervision of him, this would not carry the day for her. This is a suit under federal constitutional law rather than under the law of Indiana. We know from cases such as *Martinez v. California*, 444 U.S. 277, 285 (1980), that liability for constitutional torts is more limited in scope than common law tort liability. And, equally important, proof of the defendant's negligence is insufficient if the constitutional right that the plaintiff is trying to vindicate cannot be violated by merely negligent conduct, as is the case both generally and with specific reference to rights founded on the due process clause. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *Personnel Administrator v. Feeney*, 442 U.S. 256, 278-80 (1979); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels v. Williams*, 474 U.S. 327, 333-34 (1986). West cannot obtain a judgment against the Town of Frankton merely by showing that the Town was a negligent wrongdoer. The difficult question is what more than negligence must be shown. The answer varies by the nature of the constitutional right that the plaintiff is trying to enforce. When it is the right to the equal protection of the laws, the courts insist on a deliberate violation, that is, intentional discrimination. *Washington v. Davis*, 426 U.S. 229 (1976); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977). Otherwise proof of disparate impact would establish a violation of the Constitution. *Columbus Board of Education v. Penick*, 443 U.S. 449, 464 (1979); *United States v. Washington*, 109 F.3d 335, 338 (7th Cir. 1997);

Tucker v. United States Dept. of Commerce, 958 F.2d 1411, 1413-14 (7th Cir. 1992). When it is the right not to be subjected to cruel and unusual punishments that is involved, the plaintiff must prove that the defendant, *knowing* that the plaintiff (or someone) was at serious risk of being harmed, decided not to do anything to prevent that harm from occurring even though he could easily have done so. This is the state of mind that goes by the name of "deliberate indifference," and it is the equivalent of criminal recklessness and suffices for liability under section 1983 for the infliction of cruel and unusual punishments. *Farmer v. Brennan, supra*, 511 U.S. at 836-37; *Billman v. Indiana Dept. of Corrections*, 56 F.3d 785, 788 (7th Cir. 1995); *Campbell v. Greer*, 831 F.2d 700, 702-03 (7th Cir. 1987).

The picture is less clear with regard to infringements of other constitutional rights and with regard to municipal liability for infringements of such rights generally. The case law in this circuit is divided. Some cases, illustrated by *Archie v. City of Racine*, 847 F.2d 1211, 1218-20 (7th Cir. 1988) (en banc), and *Hill v. Shobe*, 93 F.3d 418, 421 and n. 1 (7th Cir. 1996), deem criminal recklessness a sine qua non of liability in *any* section 1983 case. Others, despite the en banc decision in *Archie*, deem the civil standard of recklessness enough for liability under section 1983 in at least some cases. *Estate of Porter v. Illinois*, 36 F.3d 684, 688 (7th Cir. 1994); see also *Kulak v. City of New York*, 88 F.3d 63, 75 (2d Cir. 1996); *Shaw v. Strackhouse*, 920 F.2d 1135, 1144-46 (3d Cir. 1990). The Supreme Court's most recent decision on municipal liability, *Board of County Commissioners v. Brown, supra*, suggests that the tort standard of recklessness is enough, 117 S. Ct. at

1391-92, as long as it isn't allowed to slide into gross negligence. *Id.* at 1390 ("heightened negligence" not enough). The formula the Court used was conscious disregard of known *or obvious* dangers, *id.* at 1391; see also *Canton v. Harris*, 489 U.S. 378, 390 n. 10 (1989), and that is the language of tortious rather than criminal recklessness. *Farmer v. Brennan, supra*, 511 U.S. at 836, 840-41; Keeton *et al., supra*, § 34, pp. 213-14; cf. *Shacket v. Philko Aviation, Inc.*, 841 F.2d 166, 171 (7th Cir. 1988). Both *Brown* and *Canton* are subsequent to *Archie*, and invite reconsideration of the standard set forth in that case, though in the present case, as we shall see, the plaintiff loses under either standard.

Under either standard, the defendant must make a deliberate choice; an inadvertent omission won't do. *Board of County Commissioners v. Brown, supra*, 117 S. Ct. at 1386, 1394; *Canton v. Harris, supra*, 489 U.S. at 389; *Palmquist v. Selvik*, 1997 WL 194130, at *13, 15 (7th Cir. Apr. 21, 1997); *Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (D.C. Cir. 1997). This explains the emphasis that the cases place on proof that the defendant, if a municipality, was acting (or not acting) pursuant to a policy or a custom, e.g., *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978); *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 478-79 (7th Cir. 1997); *Starzenski v. City of Elkhart*, 87 F.3d 872, 879 (7th Cir. 1996), implying a deliberately chosen or adopted course of action. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477-79 (1986). But *Brown* suggests as we have seen that a deliberate choice to avoid an obvious danger (or "plainly obvious," as the Court put it, no doubt for emphasis, 117 S. Ct. at 1392) is actionable under 42 U.S.C. § 1983 if the choice results in harm to a

protected interest, *even though the defendant obtusely lacks actual knowledge of the danger.* Granted, there may be less here than meets the eye. The difference between a "plainly obvious" and an actually known danger – the critical difference between the criminal and tort standards of recklessness – may have little significance in practice, given the difficulty of peering into minds, especially when the "person" whose mind would have to be plumbed is an institution rather than an individual. See *Palmquist v. Selvik, supra,* 1997 WL 194130 at *13; *Jackson v. Marion County,* 66 F.3d 151, 152 (7th Cir. 1995); *Cornfield v. Consolidated High School District No. 230,* 991 F.2d 1316, 1327 (7th Cir. 1993); cf. Keeton *et al., supra,* § 34, p. 213.

The Town of Frankton, which is to say the members of the town government who make policy for it, *Pembaur v. City of Cincinnati, supra,* 475 U.S. at 481; *Felton v. Board of Commissioners,* 5 F.3d 198, 203 (7th Cir. 1993); *Bennett v. Pippin,* 74 F.3d 578, 586 (5th Cir. 1996), did not intend Waymire to molest Amanda. Nor is there any evidence that the Town knew Waymire was molesting Amanda. Or even that it *knew* there was a serious risk of this. But all this is just to say that there is no proof that the Town was criminally reckless in failing to protect her. We should also consider whether the risk to her was nevertheless *obvious,* which would be enough to cast liability onto the Town under the tort standard of recklessness, which may *be* the standard after *Brown* and *Canton.*

Slackness, laxness, cronyism, confusion, and dumbness there were in profusion; what is lacking is an obvious risk that Waymire was a child molester. All that was obvious was that he had commented to Burger about her 13 year old daughter's being sexy. Such a comment –

in context a piece of sexual badinage with the mother – is not the equivalent of a threat to commit criminal acts upon that or any other 13 year old. Men are aware of pubescent girls, and vulgar men comment on or even to them. If the vulgar man then has sex with such a girl, someone who knew of the comment could not be thought to have overlooked an *obvious* danger to her. The Town's officials had in fact no reason to believe that Waymire was molesting or was going to molest any teenaged girl, and so the Town cannot be held liable under section 1983. The affidavit of the plaintiff's expert, a professor of criminal justice, while admissible to show that the Town had been negligent in its supervision of Waymire, was not admissible to show that this negligence constituted a municipal policy of refusing to protect teenage girls from the sexual depredations of the Town's police officers – a legal conclusion that an expert witness is not allowed to draw, *Woods v. Lecureux*, 1997 WL 159881, at *3-5 (6th Cir. Apr. 8, 1997); *Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994); *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *Stokes v. Bullins*, 844 F.2d 269, 275 (5th Cir. 1988), and an erroneous legal conclusion to boot, as well as (maybe because) one that exceeded the expert's professional competence, which was limited to describing sound professional standards and identifying departures from them. *Haley v. Gross*, 86 F.3d 630, 644-45 (7th Cir. 1996); *Salas v. Carpenter, supra*, 980 F.2d at 304-05. There is little doubt that, as the expert opined, the Town of Frankton failed to exercise due care. But that cannot make it liable ~~in a suit under 42 U.S.C. § 1983~~.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARY AMANDA WEST, a Minor Child, By and Through Her Parent and Next Friend, Rita Norris, Plaintiff, v. JAMES BRADLEY WAYMIRE, individually and in his capacity as an officer of the Frankton Police Department, the CITY OF FRANKTON, and the FRANKTON POLICE DEPARTMENT, Defendants.	Cause No. IP94-1299-C M/S

AMENDED ENTRY OF JUDGMENT

The Court expressly determines that there is no just reason for delay and enters judgment in favor of defendants CITY OF FRANKTON and the FRANKTON POLICE DEPARTMENT and against the plaintiff MARY AMANDA WEST, a minor child, by and through her parent and friend, Rita Norris, on plaintiff's federal law claims against defendants CITY OF FRANKTON and the FRANKTON POLICE DEPARTMENT. Plaintiff shall take nothing by way of her complaint on federal grounds and this cause is DISMISSED WITH PREJUDICE as to the federal claims.

After dismissing the federal claims, this Court declines to exercise jurisdiction over the state law claims. Accordingly, plaintiff's state law claims are DISMISSED WITHOUT PREJUDICE.

DATED this 19 day of September, 1996.

Larry J. McKinney
Judge, United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARY AMANDA WEST, a minor child, by and through her parent and friend, Rita Norris, Plaintiff, V. JAMES BRADLEY WAYMIRE, Individually and in his capacity as an officer of the Frankton Police Department, the CITY OF FRANKTON, and the FRANKTON POLICE DEPARTMENT, Defendants.	CAUSE NO. IP 94-1299-C M/S

ENTRY OF JUDGMENT

The Court having granted the defendants' motion for summary judgment addressed to the federal claims, JUDGMENT is now entered in favor of the defendants CITY OF FRANKTON and the FRANKTON POLICE DEPARTMENT and against the plaintiff MARY AMANDA WEST, a minor child, by and through her parent and friend, Rita Norris. Plaintiff shall take nothing by way of her complaint on federal grounds and this cause is DISMISSED WITH PREJUDICE as to the federal claims.

After dismissing the federal claims, this Court declined to exercise jurisdiction over the state law claims.

Accordingly, plaintiff's state law claims are DISMISSED WITHOUT PREJUDICE.

DATED this 11 day of April, 1996.

/s/ Geraldine Treutelaar Crockett
GERALDINE TREUTELAAR
CROCKETT, CLERK
United States District Court
Southern District of Indiana

By: /s/ Sally De Long
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARY AMANDA WEST, a minor child, by and through her parent and friend, Rita Norris,	)	
Plaintiff,	)	CAUSE NO. IP 94-1299-C M/S
v.	)	
JAMES BRADLEY WAYMIRE, Individually and in his capacity as an officer of the Frankton Police Department, the CITY OF FRANKTON, and the FRANKTON POLICE DEPARTMENT,	)	
Defendants.	)	

I. BACKGROUND

This matter pends on the summary judgment motions of the City of Frankton and the Frankton Police Department. The motion is addressed to each of the plaintiff's theories of liability against these defendants. The plaintiff alleges acts of sexual molestation against defendant Waymire, which acts occurred while Waymire was employed as a police officer by the defendants. Plaintiff offers various theories of liability against defendants, embracing both federal and state law. For the reasons set out below, the motion for summary judgment addressed to the federal claims is **GRANTED.**

II. STATEMENT OF FACTS

James Bradley Waymire ("Brad Waymire") received a bachelor's degree in political science and criminal justice from Ball State University in August of 1988. (Brad Waymire Dep. at 9-10). On April 5, 1991, he applied for a position as a police officer with the Frankton Police Department. (Brad Waymire Dep. at 35). The Frankton Town Board ("the Board") interviewed Brad Waymire and hired him as a full-time officer. Brad Waymire attended the Indiana Law Enforcement Academy from March 26, 1992, until June 18, 1992. (Brad Waymire Dep. at 83).

Calvin Pulley ("Chief Pulley") has been the Frankton Chief of Police at all times relevant to this lawsuit. When Brad Waymire became a member of the Department, David Huffman ("Officer Huffman") was the only other full-time officer. (Brad Waymire Dep. at 45). The two knew each other prior to working together as police officers, but Brad Waymire describes their relationship as "icy". (Brad Waymire Dep. at 299).

Sometime in March 1993 Officer Huffman informed Chief Pulley that he had received information about a woman in Frankton, Evelyn Harmon ("Harmon"),[1] who complained that Brad Waymire made improper comments to her. (Pulley Dep. at 23-25). Prior to receiving this information from Officer Huffman, Chief Pulley had not heard of any other complaints or rumors about Brad Waymire. (Pulley Dep. at 46). Chief Pulley requested that

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[1] Evelyn Harmon has since remarried and her name is now Evelyn Burger.

Officer Huffman contact Harmon to investigate her complaint and determine if there was any truth to her allegations. (Pulley Dep. at 28).

Harmon told Officer Huffman that sometime in September 1992, Brad Waymire, at her request, followed her home in his squad car. (Burger Dep. at 17). Harmon was going through a divorce and her husband was being released from jail after striking her. (Burger Dep. at 18; Huffman Dep. at 70). She was afraid that her husband might show up at her place of employment after his release and she wanted Brad Waymire to "stand by" if any problems developed. (Huffman Dep. at 70).

Harmon told Officer Huffman that when she and Brad Waymire arrived at her home, he exited his squad car and told her to walk toward him. (Burger Dep. at 17). When Harmon asked why, Brad Waymire stated "I want to kiss you" (Burger Dep. at 17) Brad Waymire admits asking Harmon to kiss him. (Brad Waymire Dep. at 139). However, Harmon also told Officer Huffman that Brad Waymire said "Come on baby, I've got a hard on." (Burger Dep. at 17). After refusing to kiss Brad Waymire, Harmon went inside her home. *Id.*

In addition, Harmon told Officer Huffman that Brad Waymire made comments about how good her 13 year old daughter looked in a pair of jeans and that her daughter could babysit for him any time. (Burger Dep. at 17). According to Officer Huffman, Harmon did not appear upset as she described Brad Waymire's comments about her daughter. She thought his comments were humorous. (Huffman Dep. at 73).

Officer Huffman reported his findings to Chief Pulley. (Huffman Dep. at 77). Subsequently, Chief Pulley and the board president, Myron Waymire,[2] interviewed Harmon. Harmon told them about Brad Waymire asking her for a kiss and his comments about her daughter. (Pulley Dep. at 39-40). Chief Pulley recalls Harmon stating that the comments about her daughter were not sexual in nature and that everything was being blown out of proportion. (Pulley Dep. at 39-42). Chief Pulley and Myron Waymire informed Harmon that she could file a formal complaint against Brad Waymire, but Harmon refused, stating she did not want to get involved. (Pulley Dep. at 39; Myron Waymire Dep. at 39). Harmon indicated that she was afraid of retaliation if she filed a complaint. Both Chief Pulley and Brad Waymire assured her that she should not worry about retaliation and that if she changed her mind about filing a complaint, she could talk to Chief Pulley. (Myron Waymire Dep. at 33-39).

At some point Chief Pulley told Brad Waymire that there were rumors about him involving Harmon and that Officer Huffman would investigate the allegations. (Brad Waymire Dep. at 145). Chief Pulley also informed Brad Waymire that since Frankton was a small town, he should probably inform his wife about the rumors concerning Harmon. (Pulley Dep. at 44).

On March 15, 1993, Brad Waymire sent a memo to the Board requesting a special hearing, in executive session,

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[2] Myron Waymire is Brad Waymire's second cousin. (Myron Waymire's Deposition at p. 10).

concerning the allegations that were being made against him. The memorandum reads as follows:

> According to the grievance procedure outlined in the Employee Manual I am requesting a hearing before an executive session of the Board. I would appreciate this meeting as soon as possible. Certain allegations have been made against me and I feel time is very important. My standing in the community, privately as well as professionally, as well as my family's reputation are at stake. I think you will agree that in a small community such as ours bad news spreads quickly. I also feel that if this matter is not quickly resolved my employment with the Town of Frankton and future employment anywhere else will be adversely affected.

On March 17, 1993, the Board met in executive session to discuss Brad Waymire's grievance. In addition to Myron Waymire, the Board was comprised of Robert Remington ("Remington") and Timothy Davis ("Davis"). Myron Waymire, Remington, and Davis were elected to the Town Board in November 1991 and took office effective January 1, 1992. (Myron Waymire Dep. at 14). It is the responsibility of the Board to make employment-related decisions about Frankton town employees, including police officers. (Davis Dep. at pp. 9, 16). The Board is considered Chief Pulley's supervisor. (Pulley Dep. at 5).

In addition to the three board members, Chief Pulley, Officer Huffman, and Brad Waymire attended the executive session. (Davis Dep. at 24).

Prior to the executive session, Chief Pulley orally briefed Davis about the issues that might be discussed during the executive session. (Davis Dep. at 27). Chief

Pulley told Davis that Brad Waymire requested the meeting as a result of rumors about "coming onto" some woman. (Davis Dep. at 30). In addition, Chief Pulley indicated that Brad Waymire wanted the meeting in order to discuss problems he was having with Officer Huffman. *Id.* Davis understood that there was "bad blood" between Brad Waymire and Officer Huffman. (Davis Dep. at 35).

At no time prior to discussing the agenda for the meeting with Chief Pulley did Davis have any knowledge about allegations that Brad Waymire made inappropriate comments about Harmon's daughter. (Davis Dep. at 31). In fact, Davis had not even heard Harmon's name prior to the executive session. (Davis Dep. at 67). Remington also had no prior knowledge of any complaints about Brad Waymire's conduct as an officer. (Remington Dep. at 8). Aside from information obtained during the executive session. Remington did not know about Brad Waymire's conduct toward Harmon or her daughter. (Remington Dep. at 10).

During the executive session, Officer Huffman recounted what Harmon told him. (Myron Waymire Dep. at 67). Myron Waymire informed Brad Waymire that the Board could cite him for misconduct if the allegations against him were true. (Myron Waymire Dep. at 66). Brad Waymire was informed that he acted in bad judgment in following Harmon home. (Davis Dep. at 61). However, since Harmon refused to file a formal complaint with the Board against Brad Waymire, he was not cited for misconduct. (Myron Waymire Dep. at 66).

There was a lot of friction between Brad Waymire and Officer Huffman during the executive session, (Davis

Dep. at 83) leading to both officers being reprimanded throughout the meeting. (Davis Dep. at 98). Brad Waymire expressed dismay that the inquiry into his conversation with Harmon might cause rumors that he was "messing around with 13 year old girls." (Meeting Tr. p. 22). In context, this statement clearly indicated to the Board that he recognized the inappropriateness of that kind of behavior. After the meeting concluded, the Board members were of the opinion that Officer Huffman and Brad Waymire were going to work out any differences between them. (Davis Dep. at 92).

Six months later, on September 17, 1993, Rita Norris ("Norris"), West's mother, came into the police station and informed Chief Pulley that Brad Waymire had sexually molested her daughter. (Pulley Dep. at 63). After receiving Norris's verbal complaint, Chief Pulley contacted Davis, who is Chief Deputy of the Madison County Sheriff's Department, in addition to serving as a member of the Frankton Town Board. Chief Pulley also informed Myron Waymire about Norris's allegations. (Myron Waymire Dep. at 87-88).

Ernie Crowder ("Crowder") was assigned to investigate, and at some point during the investigation Chief Pulley became aware of certain allegations involving Brad Waymire and Leslie Huffman, Officer Huffman's wife. (Pulley Dep. at 66). Officer Huffman, who met with Crowder on September 21, 1993, advised Crowder of an incident which took place between his wife and Brad Waymire sometime in 1992. Brad Waymire allegedly grabbed Leslie Huffman's bottom and tried to kiss her. (Huffman Dep. at 45). Mrs. Huffman told her husband

about this incident the evening that it happened. (Huffman Dep. at 46). However, Officer Huffman did not discuss the incident with Brad Waymire or with Chief Pulley because his wife begged him not to say anything about the incident. (Huffman Dep. at 46).

On October 8, 1994, Brad Waymire pled guilty to five counts of child molesting. (Complaint, ¶ 18.) On September 1, 1994, West filed a five-count complaint against the defendants, alleging that Brad Waymire sexually molested her on three occasions. The molestations were alleged to have occurred in June 1992, August 1993, and September 1993.

In Count I of the complaint, West alleges that Brad Waymire violated various of her constitutional rights.[3] In Count II, West alleges that the City "enforced or exercised the policy or custom of failing to adequately train, supervise and control Officer Waymire to prevent his sexual molestation of Amanda." She also alleges that the City "enforced or exercised a policy or custom of acquiescing in Officer Waymire's behavior during the eighteen (18) month period in which Officer Waymire repeatedly sexually molested Amanda." (Complaint, ¶¶ 25-26). West alleges that the City is therefore liable under 42 U.S.C. § 1983. West alleges various state law claims against Brad Waymire in Count III. In Count IV, West alleges that the City breached various duties under Indiana law by failing to adequately train, supervise, and monitor Brad Waymire. (Complaint, ¶¶ 35-36). In Count V, West alleges that

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[3] Brad Waymire failed to answer the complaint and West, therefore, obtained a default judgment against him on January 25, 1996.

the City is responsible for Brad Waymire's tortious conduct under the doctrine of respondeat superior. (Complaint, ¶ 40).

III. DISCUSSION

The City is not liable to plaintiff under 42 U.S.C. § 1983 because there is no evidence that plaintiff was harmed by a policy of the City. *See Monell v. Department of Social Services of New York*, 436 U.S. 658, 690 (1978). *Felton v. Board of Commissioners of the County of Greene*, 5 F.3d 198, 203 (7th Cir. 1993), holds that § 1983 liability cannot be conferred upon a municipality unless the complainant can show "either that the ultimate decision-making authority acted to deprive the plaintiff of a constitutional right or that the ultimate decision-making authority acquiesced in the deprivation by allowing a custom or practice of such deprivation to exist." There is no evidence in this case of either of these circumstances. Plaintiff does not accuse the Board itself of deliberately doing harm to her. Neither is there any evidence that the Board was aware of any child molesting history on the part of Brad Waymire.

No evidence was presented to indicate that the Board could have concluded anything other than that this Officer understood the impropriety of sexual contact with juveniles. He displayed his understanding of that impropriety to them in the meeting of March 17, 1993.

Plaintiff correctly points out that a policy or custom may exist if officials are aware of a particular practice and fail to stop it. "The longstanding or widespread nature of a particular practice would support the inference that

policymaking officials 'must have known about it but failed to stop it'." *McNabola v. Chicago Transit Authority,* 10 F.3d 501, 511 (7th Cir. 1993). It is the policymaker's knowledge of and acquiescence in an established practice that leads to municipal liability. *Id.*

Plaintiff alleges that the City "knew or should have known" about Waymire's sexual conduct and failed to take corrective action. In no sense can Brad Waymire's inappropriate behavior toward Harmon be found to constitute a persistent pattern of sexual molestation about which the City knew or should have known. A review of the evidence presented and the reasonable inferences drawn therefrom leaves this Court with the conclusion that there is no proof that the Town Board was or should have been aware of a particular practice that resulted in harm to the plaintiff.

Plaintiff alleges that the City had a policy or custom of inaction. *Cornfield by Lewis v. School District No. 230,* 991 F.3d 1316, 1326 (7th Cir. 1993), expressed a concern that "a municipality will bury its head in the sand rather than acknowledge and attempt to remedy unconstitutional conduct by its employees. Accordingly, in situations that call for procedures, rules, or regulations, the failure to make a policy itself may be actionable." In such a case the plaintiff must still show that "the municipality was aware either of actual deprivations or of such a strong likelihood of imminent (though unrealized) deprivations that any reasonable person would have taken preventative measures." *Jones v. City of Chicago,* 787 F.2d 200, 205 (7th Cir. 1986).

There is no evidence here of actual knowledge of sexual assaults by Brad Waymire. The lack of evidence of habitual misconduct cannot be replaced by plaintiff's evidence of her accusations against Brad Waymire, of which the City was unaware until the investigation of plaintiff's charges. There is no evidence from which a reasonable jury could draw the inference that the municipality was aware of a strong likelihood that Brad Waymire would molest a 13 year old girl. The plaintiff wants a jury to jump from notice of one inappropriate incident involving unprofessional remarks to notice of a strong likelihood of molestation. There is no basis for that jump.

Plaintiff offers two more theories to support her § 1983 claim. She alleges that the City had a policy of inadequate training and inadequate supervision of its police officers and that those failures were a proximate cause of her damages. A failure to train allegation must be tantamount to an allegation that the city was deliberately indifferent to the right of plaintiff to be free from molestation by a city police officer. *Cornfield*, 991 F.3d at 1327.

In *Cornfield*, the Court notes that "municipal liability would be proper for a failure to train when the need is not necessarily obvious from the outset, but the pattern or frequency of constitutional violations would put the municipality on notice that its employees' responses to a recurring situation are insufficient to protect the constitutional rights involved." *Id.* Again, the evidence is devoid of a pattern of constitutional violations to support the requested inference.

Plaintiff's inadequate supervision argument meets the same wall. There is no evidence of a pervasive and unreasonable risk any more than there is evidence of deliberate indifference to child molestation by a police officer. At best, there is a failure to demand a clear and unambiguous acknowledgement from Brad Waymire that his behavior with Harmon was atrocious and that it would never happen again. Brad Waymire's own concern at the executive session of March 1993 assured the Board that he understood the impropriety of being associated with rumors of misconduct with juveniles. For all these reasons, the motion for summary judgment on plaintiff's § 1983 claims is **GRANTED.**

IV. PENDENT CLAIMS

With the dismissal of West's federal claims, the Court must now determine whether to retain jurisdiction over her pendent state law claims. The Seventh Circuit has addressed this issue, and has provided a clear standard:

> When, as here, the federal claim is dismissed before trial, the district court should relinquish jurisdiction of any pendent state law claim unless there is some independent basis of federal jurisdiction, such as diversity of citizenship. A limited exception to this general rule has been recognized where there are pressing reasons for a federal court's retaining jurisdiction over a pendent claim, such as where the statute of limitations has run on filing the pendent claim as an independent lawsuit in state court.

Maguire v. Marquette Univ., 814 F.2d 1213, 1218 (7th Cir. 1987) (citations omitted); *see also Hughes v. Meyer*, 880 F.2d

967, 972 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2172 (1990). The parties here are not diverse, and according to § 34-4-19-1 of the Indiana Code, the statute of limitations for West's state law tort claims will not run before she is 20 years old, that is, two years after she reaches majority. The complaint alleges that as of 1994 she was under 16 years of age, which means the statute of limitations has not run. Therefore, she has time to file her state law claims independently in state court, and this Court has no reason to retain jurisdiction. Accordingly, plaintiff's state law claims are **DISMISSED WITHOUT PREJUDICE.**

IT IS SO ORDERED this 11 day of April, 1996.

/s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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No. 97100318

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MARY AMANDA WEST, A Minor Child, by and through her Parent and Next Friend, Rita Norris,
Petitioner,

v.

JAMES BRADLEY WAYMIRE, individually and in his capacity as an officer of the Frankton Police Department, the CITY OF FRANKTON, and the FRANKTON POLICE DEPARTMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

RESPONDENTS' CITY OF FRANKTON, AND THE FRANKTON POLICE DEPARTMENT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents, the City of Frankton and the Frankton Police Department (collectively referred to as "the Town"), disagree with the statement of the questions presented for review in Mary Amanda West's ("West") Petition for Certiorari. Instead, the questions presented for review are these:

1. Whether municipal liability may be imposed against the Town under 42 U.S.C. §1983 for the sexual molestation of a minor by one of its police officers, where the Town had no knowledge of any prior acts of sexual misconduct other than passing inappropriate remarks made to an adult.

2. Whether the Town may be held liable under §1983 for allegedly failing to train and supervise James Brad Waymire ("Brad Waymire") where the Town lacked any knowledge of a pattern of constitutional violations or prior knowledge of a widespread practice of sexual molestation of minors by its officers.

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STATEMENT OF THE CASE

The Town also disagrees with the statement of the case submitted by West for several reasons. First, West fails to advise this Court that she continues to pursue various negligence theories of liability against the Town in an Indiana state court. Under normal circumstances, reference to this omission from the statement of facts might appear petty. However, in light of West's repeated assertions in her Petition that the Seventh Circuit's decision leaves her with a wrong without a remedy, it is important for the Court to realize that West is not without remedy. Lost in West's righteous indignation is the fact that she is not without a remedy. As the Seventh Circuit correctly observed, West's federal Complaint contains supplemental state law claims and "West has since refiled it in an Indiana state court." West by and Through Norris v. Waymire, 114 F.3d 646, 647 (7th Cir. 1997).

The Petition Misrepresents The Underlying Facts

In an effort to persuade this Court to grant certiorari, West grossly misrepresents and distorts the underlying facts. West would have this Court believe that sexual misconduct by police officers was rampant in Frankton. A reading of West's Petition leaves the reader with the impression that the Frankton Town Board had long-standing knowledge about Brad Waymire's alleged sexual misconduct yet sat on its hands and took no action to remedy the situation, with the inaction culminating in Brad Waymire's sexual molestation of West. This is simply not true.

West asserts in her Petition that "the material facts are accurately recited in the Seventh Circuit's opinion." (Petition for Certiorari at p. 4). However, the purported facts as set forth in West's Petition do not accurately reflect the facts as found by the Seventh Circuit Court of Appeals. The following

illustrations are the most glaring of West's misrepresentation of the underlying facts.

West places undue emphasis upon two incidents involving Leslie Huffman, a woman who later married the Town's other full-time police officer, David Wayne Huffman. The undisputed testimony is that neither Chief Pulley nor any member of the Town Board had any knowledge about these incidents until after West's allegations about Brad Waymire surfaced. As the Seventh Circuit accurately commented, "[t]here is no direct evidence that either incident involving Mrs. Huffman was known to Chief Pulley or the Town's Board of Supervisors." 114 F.3d at 648. Thus, West cannot rely upon either of the Huffman incidents as placing the Town on notice that Brad Waymire engaged in sexual misconduct during the course and scope of his employment. These incidents did not come to light until Ernie Crowder's investigation in September, 1993, after West's allegations surfaced.

West also misrepresents certain comments made by Brad Waymire during the March 17, 1993 Executive Session of the Town Board. During that meeting, Brad Waymire made a comment about rumors that he was "messing around with 13 year old girls." Throughout her Petition, West relies on Brad Waymire's statement as evidence that the Town had actual notice of his sexual misconduct. In fact, West goes so far as to suggest that the rumors about Brad Waymire "messing around with 13 year old girls" was the reason for the executive meeting of the Town Board on March 17, 1993. This is untrue and grossly distorts the true facts.

Sometime after Chief Pulley and the Town Board President, Myron Waymire, interviewed Burger, Chief Pulley informed Brad Waymire that there were rumors about him involving Burger. Chief Pulley also informed Brad Waymire that, as Frankton was a small town, he should probably inform his wife about the rumors concerning Burger.

On March 15, 1993, Brad Waymire sent a memorandum to the Town Board requesting a special hearing, in executive session, concerning the allegations that were being made against him. The memorandum reads as follows:

> According to the grievance procedure outlined in the Employee Manual I am requesting a hearing before an executive session of the Board. I would appreciate this meeting as soon as possible. Certain allegations have been made against me and I feel time is very important. My standing in the community, privately as well as professionally, as well as my family's reputation are at stake. I think you will agree that in a small community such as ours bad news spreads quickly. I also feel that if this matter is not quickly resolved my employment with the Town of Frankton and future employment anywhere else will be adversely affected.

During the early stages of the Executive Session meeting, Brad Waymire alluded to the remarks he previously made about Burger's 13 year old daughter:

> I admitted to flirting with her, but the fact is I never flirted with her anymore than what she flirted with me. She, I believe, told you that she shocked — (unintelligible). The fact is, I asked her if I ever said anything against her, and she said, "No." I did tell her that her daughter was very pretty (unintelligible) 13 years old. Now her daughter dates an 18 year old boy, so I assume she doesn't mind anything about (unintelligible) statutory rape. She certainly (unintelligible) that. I never made any

> suggestion about her or her daughter, I never touched her, I never pursued her — and she was divorced for a time — I never pursued her, I didn't bother her, I didn't send her at any time other (unintelligible).

While West would like to attribute Brad Waymire's comment about "messing around with 13 year old girls" as the sole reason for convening the executive meeting, this is simply not true. Also, Brad Waymire's comment was certainly not an admission on his part that he was engaging in sexual relationships with West, or any other 13 year old girls. Rather, as the Seventh Circuit correctly observed, Brad Waymire's comment about "messing around with 13 year old girls" was apparently a reference to his prior remarks about Burger's 13 year old daughter looking good in a pair of jeans. 114 F.3d at 648.

West also refers to an incident where Brad Waymire purportedly exposed himself to one of Burger's co-workers as further evidence of actual knowledge of sexual misconduct. However, West conveniently neglects to inform the Court that the Town Board had no knowledge about that incident. As the Seventh Circuit correctly observed:

> The record contains evidence of other sexual misconduct by Waymire, including exposing himself to a co-worker of Burgers, although there is no evidence that the police chief or the Town Board knew about any of this other misconduct. Apart from the remarks about Burger's daughter and, of course, his conduct with Amanda, none of Waymire's sexual conduct or innuendos involved so far as anyone knows, minors. 114 F.3d at 649. (Emphasis added).

Despite West's blatant distortion of the underlying record, the fact remains that the only incident of which the Town Board had actual knowledge is the incident in which Brad Waymire made inappropriate comments to Burger. There is no evidence that the Town Board had notice of prior acts of sexual molestation of minors by either Brad Waymire or any other members of the Frankton Police Department. Similarly, there is no evidence that the Town Board knew that Brad Waymire was molesting West. 114 F.3d at 652. In addition, it is undisputed that the only incident of which the Town Board had actual knowledge, the Burger incident, involved only an allegation of inappropriate comments; not an allegation of sexual molestation.

This Court should not be taken in by West's unbridled attempt to change the factual landscape of this case. The issue presented by West's Petition is whether a municipality may be held liable under §1983 where the uncontroverted evidence is that the Town Board had knowledge only of Brad Waymire's inappropriate comments to Burger. As the Seventh Circuit correctly observed, Brad Waymire's comments to Burger are "not the equivalent of a threat to commit criminal acts upon that or any other 13 year old." 114 F.3d at 652. Under the stringent standards for municipal liability articulated by this Court in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), City of Canton v. Harris, 489 U.S. 378 (1989) and Board of Commissioners v. Brown, ___ U.S. ___, 117 S.Ct. 1382 (1997), the Seventh Circuit correctly held that the Town could not be held liable under §1983. None of the arguments advanced in West's Petition present a valid reason to disturb the Seventh Circuit's opinion.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

No Compelling Reason Exists To Review This Case

Rule 10 of the Rules of the Supreme Court cautions that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." Moreover, a petition for certiorari may be granted "only for compelling reasons," such as the existence of a conflict among the circuits. Rule 10(a).

The present case is not a case in which this Court should exercise its discretion. West's Petition contains no suggestion as to the existence of confusion or conflict in the lower courts about the law of municipal liability under §1983 or how that well-settled law is to be applied. Also, as will be set forth in the next section, the Seventh Circuit correctly applied the law as articulated by this Court in Monell, Canton and Brown.

Implicit in West's Petition is an invitation to carve out exceptions to Monell and its progeny and impose liability upon a municipality whenever a wrongdoer, like Brad Waymire, lacks the financial means to satisfy a monetary judgment. West obtained a default judgment against Brad Waymire in his individual capacity and the District Court entered a $600,000.00 judgment against him. Brad Waymire is currently serving an eight-year prison sentence, having pled guilty to five counts of child molestation.

West has not been deprived of her federal remedies under §1983. She has a substantial judgment against Brad Waymire. That Brad Waymire may be unable to satisfy that judgment is not a reason to shift the blame for his conduct to the Town.

The underlying purpose of §1983 is to provide a remedy for the wrongful conduct of a government official whose conduct "causes" the deprivation of another individual's constitutional rights. Congress did not enact §1983 to provide a deep pocket for the recovery of monetary damages.

Section 1983 is a fault-based statute. Indeed, in Monell, this Court held that a municipality may be held liable under §1983 only where the municipality itself causes the constitutional violation at issue. 436 U.S. at 694-95. This conclusion is consistent with the plain language of §1983 which provides for the imposition of liability only upon one who "subjects [a person], or causes [that person] to be subjected," to a deprivation of federal rights. In Monell, this Court emphasized that §1983 "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." Id. at 692. Consistently, this Court has refused to hold municipalities liable under a theory of respondeat superior. See e.g., Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (plurality opinion); Pembaur v. Cincinnati, 475 U.S. 469 (1986); St. Louis v. Praprotnik, 485 U.S. 112 (1988) (plurality opinion).

Moreover, nowhere in her Petition does West offer any sound public policy reasons for either overruling Monell or creating some exception to the limited circumstances under which a municipality may be held liable under §1983. The possibility that West may not be compensated by the wrongdoer, Brad Waymire, is not a sufficient reason for this Court to exercise its judicial discretion.

The Seventh Circuit Correctly Applied The Well Settled Governing Standards For Municipal Liability

West's entire Petition is founded upon her misguided belief that the "plainly obvious" standard for municipal liability discussed by this Court in Brown signals a further restriction upon the limited circumstances when municipal liability may be imposed under §1983. West goes so far as to suggest that the "plainly obvious" standard effectively overrules and undermines

the standards articulated by this Court in Monell and Canton. (Petition for Certiorari at pp. ii, 9, 15, 18, 25).

Contrary to West's argument, Brown is not a departure from the standards set out in Monell and Canton. Indeed, Brown simply reinforces the strict standards for municipal liability previously elucidated by this Court in Monell and Canton. As Brown does not alter the law of municipal liability under §1983, the Seventh Circuit correctly applied the settled law as established by this Court and West's call for clarification of this well-settled law should be rejected.

In Monell, supra, this Court held that in certain limited circumstances, a municipality may be held liable under §1983. This Court expressly rejected all notions of respondeat superior or vicarious liability under §1983. Rather, it is only when a municipal policy or custom causes the alleged constitutional violation that a municipality may be held liable under §1983. As this Court stated in Monell, supra:

> [T]he language of §1983 read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to an official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under §1983 on a respondeat superior theory.
>
> * * * *
>
> We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents.

> Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983. 436 U.S. at 691-94.

In Canton, this Court clarified the limited circumstances in which a municipality may be held liable under §1983, in a failure to train context. This Court imposed a stringent standard: a municipality may be held liable for the failure to train, only where the failure to train amounts to a "deliberate" or "conscious" choice by the municipality. Canton, supra, 489 U.S. at 388-89. This Court observed that the stringent deliberate indifference standard is "most consistent with [the] admonition in Monell...that a municipality can be liable under §1983 only where its policies are the 'moving force [behind] the constitutional violation.'" Id. As Justice O'Connor cautioned in her concurring opinion, liability under §1983 for a local government's sins of omission should not be imposed absent some showing of "a high degree of fault on the part of city officials." 489 U.S. at 396.

Under Canton, there are two avenues for asserting a failure to train claim. One avenue is to show a pattern of constitutional violations sufficient to place the entity on notice that its employees' responses to a regularly occurring situation are insufficient to protect the constitutional rights of citizens. Id., 489 U.S. at 397. This avenue is unavailable to West as there is no evidence of previous similar incidents of sexual molestation of minors by City police officers.

Second, absent a pattern of constitutional violations, municipal liability may be imposed under §1983 for failure to train only where "the need for more or different training is so obvious, and the inadequacies so likely to result in violations of constitutional rights, that the policymakers of the City can

reasonably said to have been deliberately indifferent to the need." Canton, 489 U.S. at 390. For example, in Canton, this Court observed that training as to the use of force is an area where the need for training is so "obvious," that the failure to train amounts to deliberate indifference:

> For example, City policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The City has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force...can said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. 489 U.S. at 390 n.10.

As applied to the present case, the mere possibility that an officer might possibly molest individuals with whom he might came into contact is simply not an area where the need for training is "so obvious" that the failure to train amounts to deliberate indifference. Even the most highly trained officer could sexually molest a minor. The fact that officers encounter teenage girls in their line of duty does not increase the likelihood that one of those officers might molest a teenage girl. As no causal connection exists between any alleged deficiencies in Brad Waymire's training and West's ultimate injury, it would be inappropriate to impose liability upon the Town for Brad Waymire's conduct.

Brown is this Court's most recent pronouncement concerning the limited circumstances under which municipal liability may be imposed under §1983. While West repeatedly attempts to label Brown as signaling a "shift in Section 1983 jurisprudence," nothing could be further from the truth. Brown

simply reinforces the stringent standards previously established by this Court in both Canton and Monell.

Brown involved a claim of deliberate indifference in the hiring of a police officer. The evidence revealed that Deputy Burns had a record of driving infractions and had pled guilty to various driving-related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness. Sheriff Moore, the Bryan County Sheriff, testified that he failed to adequately review Deputy Burns' background prior to hiring him. Deputy Burns allegedly used excessive force during Brown's arrest after a high speed pursuit. Brown filed suit against Sheriff Moore under §1983, asserting that municipal liability should be imposed based upon Sheriff Moore's failure to screen Deputy Brown's background prior to hiring him. The issue presented by Bryan County's Petition for Certiorari was whether it could be held liable under §1983 for a single hiring decision. This Court revisited its prior decision in Monell and Canton and held that "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." 117 S.Ct. at 1382.

Relying upon the Canton, this Court held in Brown that the failure to scrutinize an individual's background may result in municipal liability only if the consequences of inadequate screening are so "plainly obvious" that they would result in a violation of an individual's constitutional rights. As the following passages from Brown demonstrate, the "plainly obvious" standard is simply a reaffirmation of the stringent standard articulated in Canton:

> As our decision in Canton makes clear, "deliberate indifference" is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Unlike the risk from a particular

glaring omission in a training regime, the risk from a single instance of inadequate screening of an applicant's background is not "obvious" in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that is only a generalized showing of risk. The fact that inadequate scrutiny of an applicant's background would make a violation of rights more likely cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a specific constitutional violation. After all, a full screening of an applicant's background might reveal no cause for concern at all; if so, a hiring official who failed to scrutinize the applicant's background cannot be said to have consciously disregarded an obvious risk that the officer would subsequently inflict a particular constitutional injury.

We assume that a jury could properly find in this case that Sheriff Moore's assessment of Burns' background was inadequate. Sheriff Moore's own testimony indicated that he did not inquire into the underlying conduct or the disposition of any of the misdemeanor charges reflected on Burns' record before hiring him. But this showing of an instance of inadequate screening is not enough to establish "deliberate indifference." In layman's terms, inadequate screening of an applicant's record may reflect

> "indifference" to the applicant's background. For purposes of a legal inquiry into municipal liability under §1983, however, this is not the relevant "indifference." A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federal expected right can the official's failure to adequate scrutinize the applicant's background constitute "deliberate indifference." 117 S.Ct. at 1391-92.

West suggests that certiorari should be granted in this case because the Seventh Circuit purportedly expressed doubt as to whether criminal recklessness or civil recklessness satisfies the deliberate indifference standard. However, the Seventh Circuit was not confused as to the stringent standards applicable to this case. The Seventh Circuit merely observed that this Court's decision in Brown "suggests that the tort standard of recklessness is enough...as long as it isn't allowed to slide into gross negligence." 114 F.3d at 651. However, as the Seventh Circuit quickly observed, the standard for deliberate indifference remains "conscious disregard of known or obvious dangers." Id.

Without question, the deliberate indifference standard is an elusive standard with which numerous federal courts have struggled since the pronouncement of that standard in Canton. The Seventh Circuit's observations in the present case simply reflect the elusiveness of the deliberate indifference standard. However, as the Seventh Circuit observed, under either a

criminal recklessness standard or under a civil recklessness standard, "the defendant must make a deliberate choice; an inadvertent omission won't do." 114 F.3d at 651.

As the Seventh Circuit correctly observed, West loses, regardless of whether a criminal recklessness standard or a civil recklessness standard applies to this case, as the evidence fails to demonstrate an obvious risk that Brad Waymire would molest her:

> But Brown suggests as we have seen that a deliberate choice to avoid an obvious danger (or "plainly obvious," as the Court put it, no doubt for emphasis, 117 S.Ct. at 1392) is actionable under [§1983] if the choice results in harm to a protected interest, even though the defendant obtusely lacks actual knowledge of the danger. Granted, there may be less here than meets the eye. The difference between "plainly obvious" and an actually known danger — the critical difference between the criminal and tort standards of recklessness — may have little significance in practice, given the difficulty of peering into minds, especially when the "person" whose mind would have to be plumbed is an institution rather than an individual.
>
> The Town of Frankton...did not intend Waymire to molest Amanda. Nor is there any evidence that the Town knew Waymire was molesting Amanda. Or even that it knew there was a serious risk of this. But all of this is just to say that there is no proof that the Town was criminally reckless in failing to protect her. We should also consider whether the risk to her was nevertheless obvious, which would be enough to cast liability onto the Town under the tort

standard of recklessness, which may be the standard after Brown and Canton.

> Slackness, laxness, cronyism, confusion, and dumbness there were in profusion; what is lacking is an obvious risk that Waymire was a child molester. All that was obvious was that he had commented to Burger about her 13 year old daughter's being sexy. Such a comment — in context a piece of sexual badinage with the mother — is not the equivalent of a threat to commit criminal acts upon that or any other 13 year old girl. Men are aware of pubescent girls, and vulgar men comment on or even to them. If the vulgar man then has sex with such a girl, someone who knew of the comment could not be thought to have overlooked an obvious danger to her. The Town's officials had in fact no reason to believe that Waymire was molesting or was going to molest any teenage girl, and so the Town cannot be held liable under section 1983. 114 F.3d at 651-52 (emphasis added) (citations omitted).

Finally, West suggests that this Court grant certiorari for the purpose of applying a reasonable foreseeability test in determining whether an obvious risk existed that an untrained and unsupervised Brad Waymire might molest her. West's reasonable foreseeability suggestion smacks of a negligence standard, a standard which has been repeatedly rejected by this Court in discussing municipal liability under §1983. Anything is foreseeable. Under West's formulation, if any possibility exists that an officer might engage in unconstitutional conduct, the municipality should be held liable under §1983. Without doubt, this is not the law as articulated by this Court in Monell, Canton,

and Brown. Other than to suggest that adoption of this standard would ensure full compensation of a victim, West articulates no public policy reasons for such a dramatic change in the law. Indeed, the new standard proposed by West would impose §1983 liability against governmental officials without proof of any actual wrongdoing on their part. Section 1983 was never so intended.

CONCLUSION

The Seventh Circuit Opinion correctly applied the controlling precedent of this Court and did not erroneously decide any new questions of law. Municipal liability under §1983 should be the exception to the rule; not the rule. To hold that the sparse evidence presented by West satisfies the stringent standards articulated in Monell, Canton, and Brown would signal a return to concepts of respondeat superior under §1983. There is no reason to disturb the Seventh Circuit's well-reasoned opinion and the Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 97-318

In The

Supreme Court of the United States

October Term, 1997

MARY AMANDA WEST, a Minor Child, by and through her Parent and Next Friend, Rita Norris,

Petitioner,

v.

JAMES BRADLEY WAYMIRE, individually and in his capacity as an officer of the Frankton Police Department, the CITY OF FRANKTON, and the FRANKTON POLICE DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Petitioner Amanda West ("Amanda"), by counsel, submits this reply in support of her petition for writ of certiorari in order to respond to misstatements and analytical deficiencies in the brief in opposition of the Town of Frankton (the "Town"). The Town does not dispute that Amanda was sexually molested on multiple occasions by Officer Waymire while he was on duty, armed and in uniform, at a time when she was twelve and thirteen years old. Nor does the Town contest the record of a longstanding policy of tolerance regarding sexual misconduct by police officers, including an unwritten rule that sexual relations in the police station itself would result only in a reprimand the first time an officer was caught. The Town does not deny that it failed to provide any training or establish any procedures regarding the handling of juvenile females taken into police custody, that the Town had a history of protecting officers against complaints of misconduct, and that the Town condoned an atmosphere of sexual abandon on the part of its officers.

Most notably, the Town makes no attempt to contradict the showing that it failed to take corrective action despite actual notice of Officer Waymire's sexual overtures towards a woman and her thirteen-year-old daughter. It is undisputed that the Town deviated from standard procedure by not referring the matter to an independent agency, assured the investigating officer that Officer Waymire would not be fired, notified Officer Waymire of a scheduled interrogation of the complainant so he could confront her beforehand, conducted the investigation through a Town Board member who was also Officer Waymire's cousin, dropped the matter ostensibly because there was no written complaint even though the complainant was not told one was necessary or invited to file one, and did nothing in response to a Town Board meeting in which Officer Waymire admitted there were rumors he was "messing around with thirteen-year-old girls."

Notwithstanding that uncontradicted record, the Town accuses Amanda of misstating the facts and insists that it is entitled to judgment as a matter of law under the standards of municipal liability established by this Court. Amanda has *not* misrepresented the record, directly or by implication, and submits that it is the

Town and the Seventh Circuit that have failed to construe the record in the light most favorable to Amanda, the party opposing summary judgment. The Town's contention that summary judgment was properly granted in its favor turns, moreover, on an extreme interpretation of the "plainly obvious" standard of municipal liability recently articulated by this Court in *Board of County Commissioners v. Brown*, ___ U.S. ___, 117 S. Ct. 1382, 137 L.Ed.2d 626 (1997). The legal theory advanced by the Town confirms the insurmountable obstacles faced by any party bringing a civil rights claim against a municipality under current law, and the pressing need for clarification or revision of the municipal liability standard by this Court.

II. LEGAL ANALYSIS

A. Amanda's Fact Statement was Entirely Accurate

The Town is mistaken in contending that Amanda concealed her state law claims against the Town. *See* Opposition at 1. Amanda specifically stated that her complaint raised "federal and state law claims," that the District Court "declined to exercise jurisdiction over Amanda's state law claims" and dismissed them "without prejudice," and that the Seventh Circuit's decision left her without "an effective *federal* remedy." *See* Petition at 2-3, 9 (emphasis added). As for the pending state law proceeding, the Court can rest assured that the Town has not conceded its liability and continues to contest vigorously any recovery by Amanda against it at all. As state law claims are governed by different rules of liability and offer distinct remedies from Section 1983, Amanda may yet receive *no* compensation and in any event will not secure in state court the full scope of relief available under federal law.

The Town falsely accuses Amanda of "glaring . . . misrepresentation" in suggesting that several instances of sexual misconduct by Officer Waymire were known to Town decisionmakers. *See* Opposition at 2, 4. On the face of her Petition, Amanda stated that the Seventh Circuit concluded the incidents were not known to Town policymakers, but pointed out that that view is inconsistent with testimony that Officer Waymire's conduct *was* common knowledge. *See* Petition at 5.

Leslie Huffman testified that, because of the Town's small size, if one person knew of something soon "everybody" would know, and in particular she was sure that Officer Waymire's conduct towards her was public knowledge well before his molestation of Amanda came to light. Several other witnesses corroborated the rapid flow of information and rumors within the small Town. As the Town itself admits, Chief Pulley advised Officer Waymire to inform his wife about the incidents with Evelyn Burger, "as Frankton was a small town." *See* Opposition at 2. *See also id.* at 3 (quoting Officer Waymire as stating "in a small community such as ours bad news spreads quickly").

This case came before the Seventh Circuit on review of a grant of summary judgment against Amanda. "On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). In this procedural posture, the Court is required to construe the record in the light most favorable to Amanda. It is for the jury to decide whether to favor Leslie's testimony that the incidents were common knowledge, supported by the consistent corroboration of multiple witnesses on the flow of information in a small town, over the self-serving claims of ignorance by Town officials accused of protecting a child molester. Amanda certainly did not misrepresent the record, in any event, by suggesting that the Seventh Circuit failed to credit an alternative interpretation of the evidence.

Although the Town contends, finally, that Amanda "grossly distorts" the circumstances surrounding the Town Board meeting in which Officer Waymire referred to rumors he was "messing around with thirteen-year-old girls" (*see* Opposition at 2-4), its description supports rather than contradicts Amanda's account. The Town denies the meeting was convened in response to the reports concerning Officer Waymire's conduct towards Evelyn and her thirteen-year-old daughter (*id.*

at 2), but immediately goes on to state that Officer Waymire requested the meeting after Chief Pulley warned him that his wife was likely to learn about those reports due to the Town's small size (*id.* at 2-3). The Town denies the Town Board had notice of any sexual misconduct by Officer Waymire (*id.* at 2), but admits that Officer Waymire stated during the meeting there were rumors he was "messing around with thirteen-year-old girls" (*id.*). The Town does not deny, moreover, that Chief Pulley and Town Board member Myron Waymire received a full account of the incidents directly from Evelyn even before the meeting.

As though it were a complete exoneration, the Town quotes highly suggestive remarks made by Officer Waymire at the Town Board meeting about Evelyn's thirteen-year-old daughter: "Now her daughter dates an 18 year old boy, so I assume she doesn't mind anything about (unintelligible) statutory rape. She certainly (unintelligible) that." *See* Opposition at 3. Far from putting to rest any suspicion of misconduct, Officer Waymire strongly implied that his actions were excusable because the girl was already sexually active. The suggestion that Evelyn did not really "mind" any "statutory rape" of her daughter should have heightened the concern of the Town Board, and can hardly be construed as lulling it into justifiable inaction.

In every particular, the facts recited by Amanda in the Petition are firmly grounded in the evidentiary record. By urging this Court, as it did the Seventh Circuit, to credit its interpretation of the record over Amanda's, the Town deviates from settled principles governing consideration of summary judgment motions.

B. The Town Confirms that Certiorari Should be Granted in Order to Clarify an "Elusive" Legal Standard and Prevent the Establishment of a "Rule" Against Municipal Liability

The thrust of the Town's legal analysis (*see* Opposition at 6-16) is that review by this Court is unnecessary because the Seventh Circuit correctly applied the "well settled" standards

of municipal liability under Section 1983. Telltale admissions in the Town's discussion, however, confirm that review by this Court is required to resolve persisting confusion regarding the application of an important federal statute and to rectify the precedential impact of a published Court of Appeals decision authored by an influential Chief Judge raising insurmountable barriers to civil rights claims against municipalities.

1. The standard for municipal liability under Section 1983 is far from "well settled"

The Town contradicts the central premise of its opposition to certiorari in this case – the contention that the Seventh Circuit applied "well settled" standards of municipal liability – by admitting that this Court's decisions have established an "elusive" standard that is difficult to apply. *See* Opposition at 13. The Town admits that "numerous federal courts have struggled" with that "elusive" standard, and that the Seventh Circuit decision in this case is a reflection on that "elusiveness." *Id.*

The Town confesses to the "elusiveness" of the municipal liability standard in the context of addressing the Seventh Circuit's doubt as to whether civil or criminal recklessness is required. *See* Opposition at 13. The suggestion that the distinction does not matter in this case because Amanda "loses" under either standard (*id.* at 14) is incorrect and misses the point. If, as the Seventh Circuit ultimately concluded (*see* Petition at 12a-14a), this Court's decisions indicate the tort standard of recklessness is sufficient to support liability, then the question is whether Officer Waymire represented an "obvious" danger, *not*, as the Town contends (*see* Opposition at 5), whether Town policymakers had actual knowledge of his misconduct. Amanda submits that the record in this case is more than sufficient to support a jury conclusion that the Town disregarded an "obvious" danger that Officer Waymire would violate the civil rights of a female citizen. *See* Petition at 18-21. The Seventh Circuit's confusion on the proper standard, in any event, points to the need for clarification by this Court on a subject of recurring perplexity in Section 1983 jurisprudence.

2. The Town misconstrues the *Brown* decision as adding nothing new to the law of municipal liability

In support of its contention that the Seventh Circuit simply applied "well settled" legal standards, the Town takes the position that this Court's recent decision in *Brown* did not in any way affect the existing standard of municipal liability. *See* Opposition at 7-8. The Town claims that "*Brown* does not alter the law of municipal liability under §1983" at all (*id.*), but rather "simply reinforces" the same standards "previously established" by this Court, and that *Brown* is nothing more than a "reaffirmation" of prior law (*id.* at 10-11).

The Town's attempt to downplay the significance of *Brown* is implausible and revealing. In general, this Court does not grant certiorari simply in order to issue opinions saying only that the law is still the same. By deciding *Brown*, this Court plainly perceived precedential significance in the case and intended the majority opinion to guide litigants and federal judges in future cases. *Brown*, a 5-4 decision, reflected a sharply divided Court raising widely divergent views on the subject of municipal liability. The four dissenting justices, certainly, regarded the majority opinion as a significant shift in the application of Section 1983 to municipalities. The impact on the Seventh Circuit's decision in this case is unmistakable, as Chief Judge Posner cited *Brown* more than half a dozen times as supporting the affirmance of summary judgment for the Town. *See* Petition at 9a, 12a-14a.

The Town misrepresents Amanda's position as being that *Brown* effectively overruled this Court's decisions in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and *City of Canton v. Harris*, 489 U.S. 378 (1989). *See* Opposition at 7-8. To the contrary, Amanda submits that it is the *Seventh Circuit's* decision in this case that *de facto* overrules *Monell* and *Canton*. As explained in the Petition, *Brown* is properly interpreted in the context of the two unique circumstances this Court emphasized as driving the decision there, neither of which pertain here: (1) the challenged conduct was a hiring decision rather than deficient training or supervision;

and (2) the claim was based on an isolated instance rather than a pattern of misconduct. *See* Petition at 15-18. The Seventh Circuit nevertheless applied *Brown* without addressing either of the two critical distinctions, creating a conflict with the *Canton* standard applicable to training and supervision cases. While *Brown* safeguards the *Monell* principle barring vicarious liability, the Seventh Circuit's decision here threatens the viability of the *Monell* holding that municipalities *are* subject to liability under Section 1983 upon an adequate showing of fault.

The Town, protesting too much that *Brown* is nothing but a reiteration of "well settled" principles, apparently recognizes that the state of the law in the wake of *Brown* is decidedly *un*settled and warrants a clarifying decision by this Court. The Seventh Circuit's application of *Brown* here realizes the very danger that Justice Souter predicted in his dissenting opinion in *Brown*, that the "newly-demanding" standard would translate into "a virtually categorical impossibility" of establishing municipal fault. *See* 117 S. Ct. at 1396.

3. The Seventh Circuit's extreme interpretation of the newly articulated "plainly obvious" standard would effectively grant municipalities civil rights immunity

The Town defends the Seventh Circuit's reading of the "plainly obvious" language in *Brown* as precluding liability unless, in essence, Officer Waymire formally announced to Town officials that he was planning to molest underaged girls. *See* Opposition at 5, 9-10. A policy of sexual tolerance and a custom of protecting officers accused of misconduct, apparently, is not enough, even though police officers routinely detain, search and arrest females in the course of their duties and are in a unique position to coerce sexual favors. Amanda may be a female, and there may have been an obvious risk that females would be sexually abused, but Town officials, supposedly, were not aware that Officer Waymire was likely to molest a *minor* female. The Town offered no training and had no established procedures to protect the rights of juvenile females taken into custody by police officers, but its decision-makers, theoretically, did not consciously anticipate that such

girls would be *sexually* mistreated by officers. Officer Waymire made a lurid invitation to one thirteen-year-old, admitted there were rumors he was "messing around with thirteen-year-old girls" and had frequent unsupervised contact with Amanda, but, claims the Town, never openly admitted he was actually *molesting* any adolescent girls.

Under any set of facts, there will be some aspect of the particular violation that municipal policymakers can claim they did not contemplate, regardless of their culpability in fostering the conditions that led to it. The Town's chain of rationalization is apparent: child molestation is a horrible crime, dignified Town officials would never condone such a terrible thing, therefore they could not have known it was happening and hence should not be held responsible. The same reasoning, of course, would hold true with respect to any number of brutal and reprehensible abuses of official power by police officers and other municipal employees, but to insulate the municipality from liability is to promote a lack of accountability and thereby perpetuate the kinds of civil rights violations that Section 1983 was designed to remedy.

The Town argues that Amanda advocates a simple negligence standard by proposing a test of reasonable foreseeability (*see* Opposition at 15-16), but it is the Town that confuses the standard of liability with the test for causation. *See, e.g., Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992) (framing two-step analysis to determine municipal liability: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation"). The municipality's culpability is measured by its "deliberate indifference" (*see Canton*, 489 U.S. at 388), but it is a separate question whether the violation was proximately caused by that indifference (*id.* at 390-91). Here, Amanda submits the record is more than sufficient to support a jury finding of an adequate causal link between Officer Waymire's actions and the Town's defective policies, procedures, customs, training and supervision. *See* Petition at 18-21.

Violence, intimidation and oppression at the hands of those to whom local governments issue firearms and entrust with law enforcement authority is a serious societal problem

going far beyond the immediate interests of the molested girl in this case. The same rule of law that would bar recovery of damages from municipalities in cases like this would also, of course, prohibit use of a federal court's injunctive powers to correct conditions shown to be conducive to civil rights violations. Suits limited in scope to the personal liability of individuals offer little opportunity to address the institutional origins of unconstitutional conduct. This Court should hesitate and consider carefully before endorsing a truncation of the authority of the federal judiciary to remedy constitutional violations in this context.

4. The Town correctly perceives that the Seventh Circuit's decision establishes a "rule" against municipal liability

The Town boldly contends: "Municipal liability under §1983 should be the exception to the rule; not the rule." *See* Opposition at 16. The notion that municipalities cannot be subjected to Section 1983 liability except in the most extraordinary circumstances not present even in the compelling facts of this case, indeed not even raising a jury issue in this context, clearly *does* amount to the establishment of a *de facto* "rule" against municipal liability.

The decisions of this Court at one time did support the view that there was a rule against municipal liability, on the theory that municipalities were not "persons" within the meaning of Section 1983. *See Monroe v. Pape*, 365 U.S. 167, 187-92 (1961). That rationale, however, was overruled by *Monell*, in which this Court held that municipalities *are* "persons" subject to liability under Section 1983. *See* 436 U.S. at 689-94. *Monell* established a rule against *vicarious* liability on the part of municipalities (*id.*), but *Monell* and its progeny have *not* established any rule against liability based on municipal fault, and this Court has not suggested that such liability has disfavored status or should be applied only grudgingly and with great reluctance. Given that municipalities are "persons" within the meaning of Section 1983, a rule against liability or a special

requirement that municipalities be held liable only in exceptional circumstances would be inconsistent with the plain language of the statute: "[e]very person" who deprives a citizen of civil rights under color of state law "shall be liable" in a civil action. *See* 42 U.S.C. §1983.

While the Town sees the law as having come full circle back to the rule in *Monroe* that municipalities cannot be held liable under Section 1983, at least absent extraordinary circumstances unlikely ever to be presented, Amanda urges a reaffirmation of the *Monell* principle that municipalities *are* subject to civil rights liability under federal law. The erosion of that holding in *Monell* and the reemergence of *Monroe* as at least a rule of thumb is now squarely before the Court in this case. If the state of the law, as exemplified by the Seventh Circuit's decision, indeed calls the viability of *Monell* into question, Amanda respectfully submits, in keeping with the dissenting opinions in *Brown*, that it is the prohibition against vicarious liability that should be reconsidered rather than the inclusion of municipalities within the scope of Section 1983.

III. CONCLUSION

This case squarely presents unsettled legal issues concerning the application of Section 1983 to municipalities, and does so in a compelling fact setting in which the equities of the case are commensurate with the importance of the issues. Amanda respectfully prays that this Court grant the Petition and agree to hear her case.

Respectfully submitted,

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